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In the Court of Appeal

Appeal from the County Court of the County of
Middlesex.

Between

SILAS G. MOORE,

(Appellant) PLAINTIFF,

AND

THE GRAND TRUNK RAILWAY OF CANADA,

(Respondents) DEFENDANTS.

APPEAL BOOK.

ELLIOT & JARVIS,

JOHN BELL, Q. C.,

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Solicitors for Appellant.

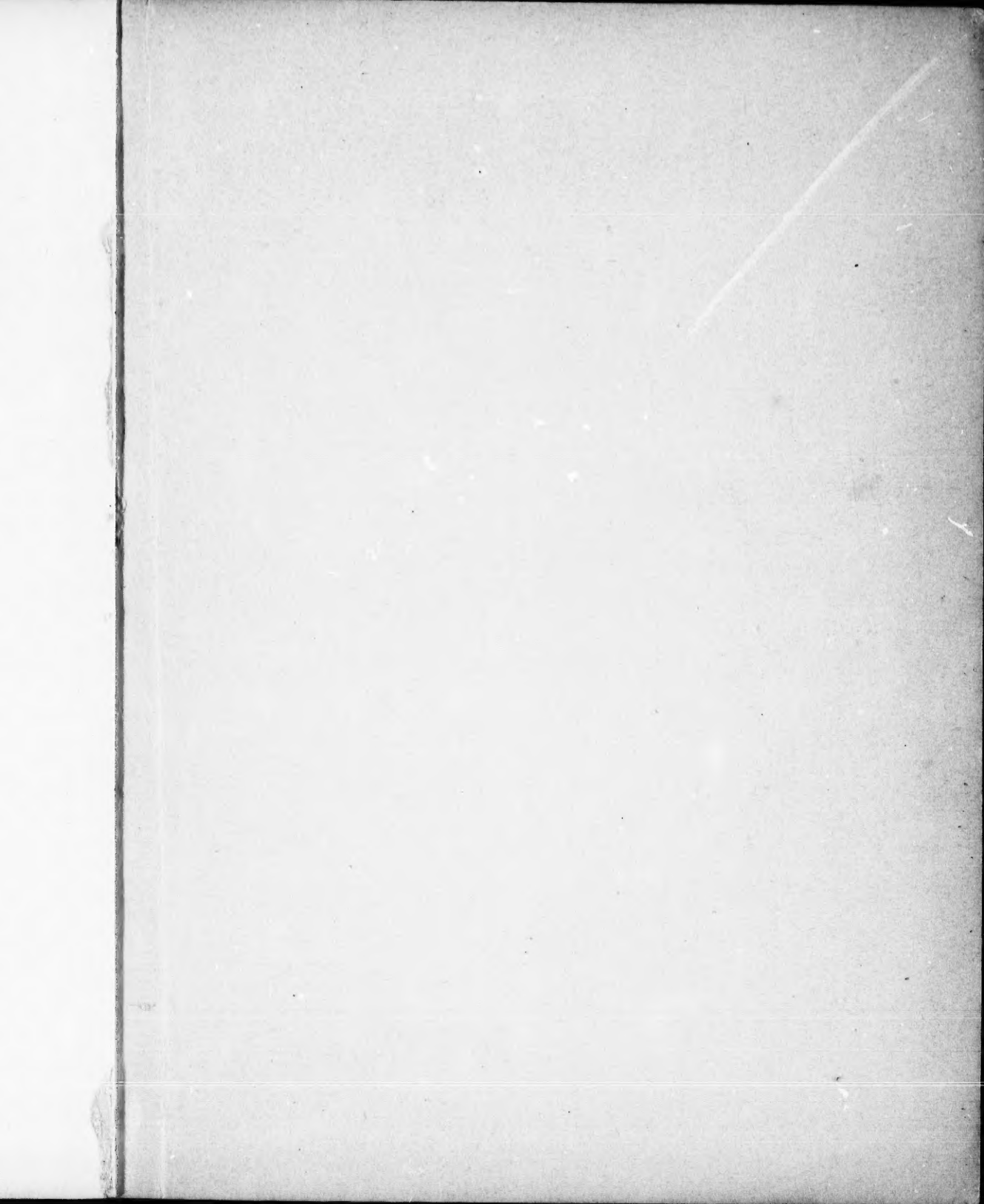
Solicitor for Respondents.

London, Ont. :

LONDON PRINTING AND LITHOGRAPHING COMPANY.

1890.





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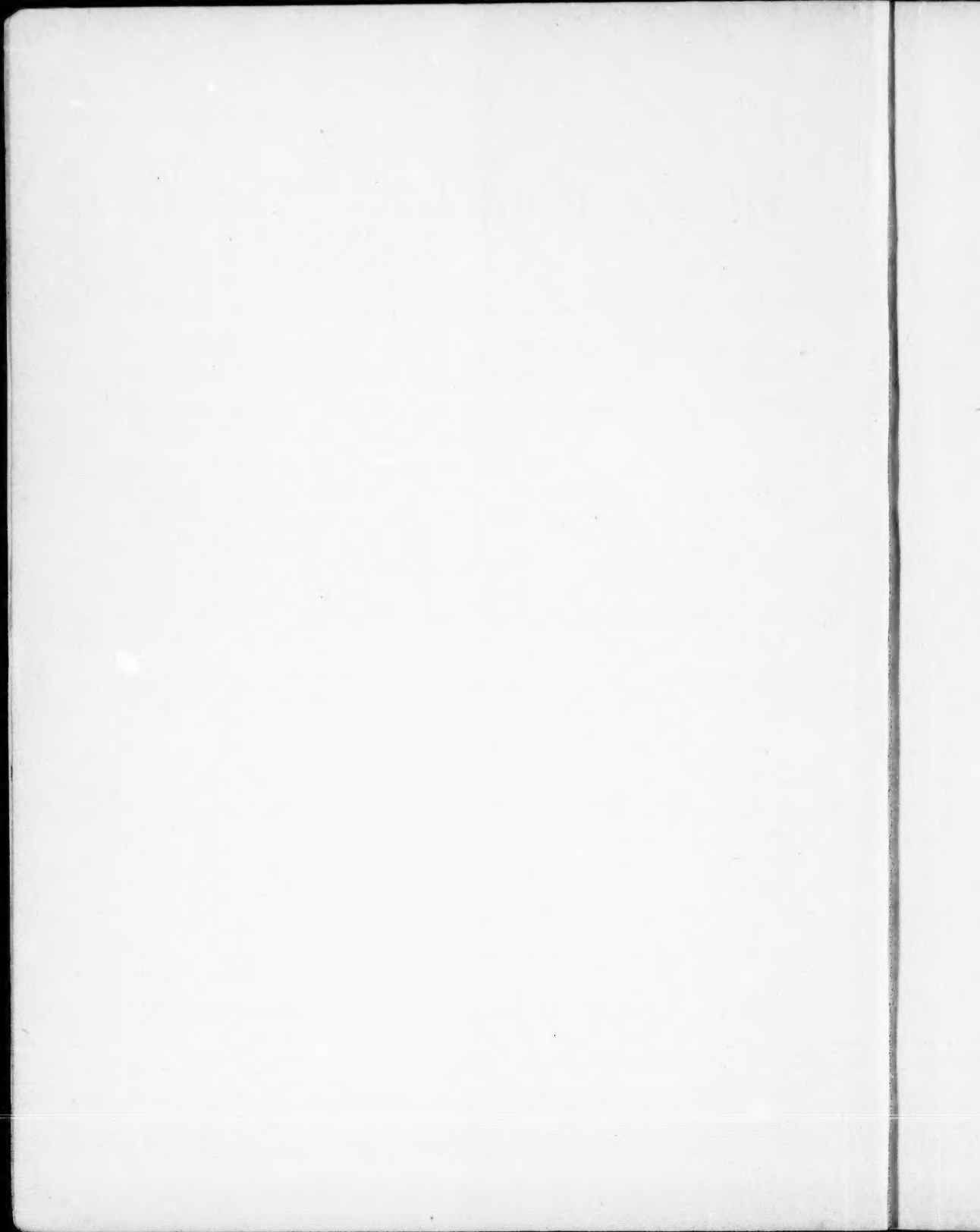
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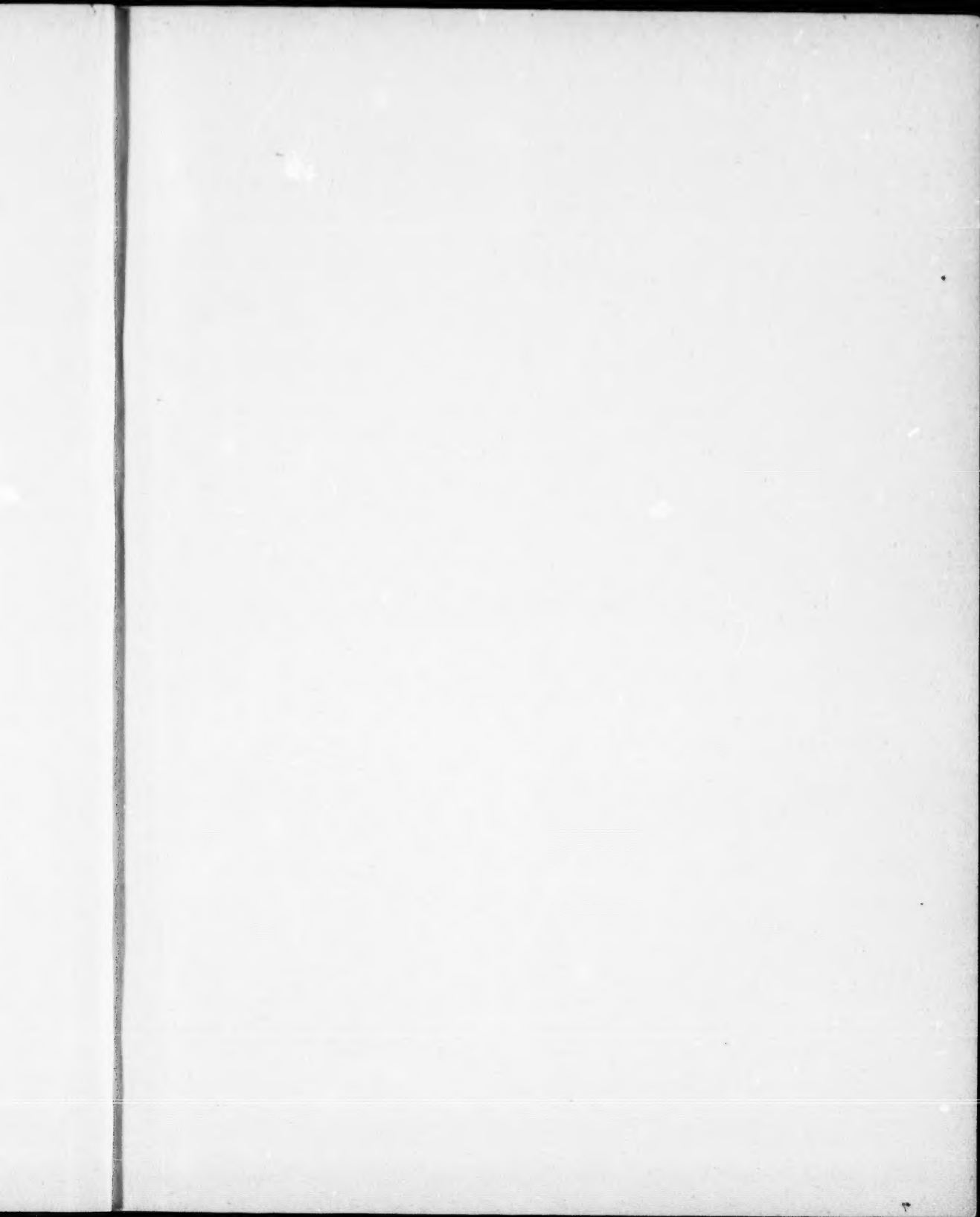
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In the Court of Appeal.

IN THE COUNTY COURT OF THE COUNTY OF MIDDLESEX.

BETWEEN

SILAS G. MOORE,

(Appellant) Plaintiff,

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(Respondents) Defendants.

STATEMENT OF CASE.

- 10 This is an action brought by the plaintiff for personal injuries and damage to property sustained by the plaintiff by reason of a freight train of the defendant company coming into collision with the conveyance in which the plaintiff was driving while crossing the tracks of the said company on Maitland street, in the City of London, which accident the plaintiff attributes to the negligence of the servants of the defendant company. The learned judge at the trial put eleven questions to the jury, and on the answers to these questions he entered a verdict for the defendants with costs. Against this verdict the plaintiff now appeals.

The judges power

Indicature Act Chap 44 Sec 84 requires that judge shall direct judgment to be entered on the findings of the jury on the questions they answer.

Moore v Connecticut
Life Ins Co Judge of
Pny Council 6 Supreme
Rebats 703

That the Court below had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendants in direct opposition to the findings of the jury on a material issue

Head note

but it is not, that the plaintiff never comes here been no answer as it is only where it can be said that there is no any evidence in support of the plaintiffs case that a new suit can be entered: and that in this case the proper verdict which the law required to be entered, upon the answers of the jury was one in favour of the plaintiff.

Ritchie C.J. We have no power to deal with the case otherwise than to say that the Court of Appeals Bench should not have ordered a verdict for the plaintiff on the findings of the jury to be converted into a verdict for the defendants.

Henry J.

if difference of opinion too existed as to the power of either that Court (Court of Appeal) or the Court of Appeals Bench, where the verdict was entered by the presiding judge as in this case upon special findings of the jury, to order a verdict to be entered for the defendants, or a new suit, some of the proper holding correctly as I think that the Court came out in such a case order a new trial.

I have not failed to consider the effect of the statute under which the questions were propounded to the jury and think I am justified in saying, as I have the occasion to do, that in a case like the present the Court could not enter a verdict for the defendants or a new suit, and that the power in such cases is limited to making an order for a new trial.

hence the order was not justifiable and we can do in that respect is to reverse the judgment.

WRIT ISSUED 3RD DECEMBER, 1889.

STATEMENT OF CLAIM.

1. The plaintiff is a bailiff, residing at the City of London, and defendants are a railway corporation operating throughout Canada.

2. On the 2nd day of October, 1889, the plaintiff was crossing the tracks of the defendant company at Maitland street, in the said City of London, when a freight train, or a portion thereof, came in contact with the conveyance in which the plaintiff was driving, overturning the said conveyance and violently throwing the plaintiff to the ground.

3. By said collision said conveyance was completely destroyed and the plaintiff was much
10 injured in the back and right hand.

4. The plaintiff alleges that said accident was caused through the negligence of the defendants' servants, no watchman being stationed at said crossing, or no intimation whatever conveyed to him of the approach of said train.

The plaintiff claims \$100 damages for destruction of said conveyance, and \$100 for his personal injuries. The plaintiff proposes this action to be tried at London.

Delivered and filed this 14th day of January, 1890, by Hume B. Elliot, of the City of London, Plaintiff's Solicitor.

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37
H
11
See

Moore }
Connecticut }

Gurpene J.

The position in which this case at present stands is certainly not satisfactory. The learned judge before whom the case was tried entered a verdict for the plaintiff the verdict which on his judgment the answers of the jury to the questions put to them required to be entered. The Court of Appeals Bench reversed that verdict and has ordered one to be entered for the defendants upon the issues joined on the second and fourth pleas.

It is only where it can be truly said that there is not any evidence in support of the plaintiff's case that a nonsuit can be entered. When the question is as to the value or weight of the evidence it must be submitted to the jury. And as it seems to me the question was wholly as to the value or weight of the evidence as bearing upon the issues joined and was in fact eminently one for the jury, but in a case like the present or in any case where issues are joined upon pleas the onus of proving which lies on the plaintiff. I do not think it has ever been suggested or held that the Court would be justified in withdrawing the issues joined from the jury and entering a nonsuit. Because in their opinion the defendants have proved his pleas beyond all rational controversy. The only way therefore in which the case can be constitutionally disposed of is by a verdict determining the issues joined upon the pleas either in favour of the plaintiff or of the defendants.

Referring to our act
37 Vic chap 7 Sec 32

Same as our jurisdiction
Act RSO chap 44
Sec 84

Now under this act the judge is not invested with the character and responsibility of a juror to find facts. In respect of a jury to find facts. In respect of the kind - his plain and simple duty is as a judge to enter the verdict in the manner in which the law requires that it should be entered upon the answers of the jury and upon nothing else. The questions put to the jury ought therefore to be such as express in his opinion to make all the points necessary to be determined in order to enter a verdict upon all the issues joined upon the second

STATEMENT OF DEFENCE.

By Statute.—Consolidated Statutes of Canada, Chapter 66, Section 83; also the Railway Act 51, Victoria Chapter 29, Section 287; both public acts.

The defendants say that they are not guilty as in the plaintiff's statement of claim alleged.

The defendants further say that the said alleged injury and damage complained of in the statement of claim was caused by the want of care and attention of the plaintiff, and that by the exercise of reasonable care and caution the plaintiff could have avoided the same.

Delivered this 3rd day of February, 1890, by John Bell, of the City of Belleville, in the County of Hastings, Solicitor for the defendants.

JOINDER.

The plaintiff joins issue on the defendants' statement of defence herein.

Delivered and filed this 7th day of February, 1890, by Hume B. Elliott, of the City of London, plaintiff's solicitor.

Moore
Connecticut }

Guy and J.

Strong concurred

Hornier concurred

And it has always appeared to me to be very clear that nothing under this section a judge has no power whatever to do more than to take the verdict in the manner in which in his judgment the law requires that it should be entered upon the answers given by the jury and upon nothing else. The point to be determined simply is whether upon the facts as found by the answers assuming those answers for the present to be true the verdict which the law requires to be entered is one in favor of the debt? And to this question the only answer which can be given as it appears to me must plainly be that upon these answers as they stand a verdict cannot be entered for the debt without doing open violence to the facts found by the jury which facts upon the present inquiry must be taken to be uncontestedly true. I feel by Guy to use an expression of Lord Denman, would be a mocking a delusion and a snare, to put such findings of a jury upon the facts involved in the issue. James showed he was competent for a court to take a verdict for the debt; I confess that I cannot understand how it can be contended for a moment that upon these answers a verdict should be entered for the debt which would involve the entry of a judgment upon record that the answers which the jury expressed find to have been true and true were untrue. Whether the findings of the jury upon the questions submitted to them was or not against the right of evidence is a question not open to us upon this appeal. The single point therefore upon which our judgment must proceed being that the Court of Exchequer Erred when they ordered the writ which was return for the bill upon the finding of the jury to be converted into a verdict for the debt.

Act 51,

the state-
exercise

County

London,

TRIAL.

BEFORE HIS HONOR FREDERICK DAVIS, JUNIOR COUNTY COURT JUDGE,
AND A JURY.

H. B. ELLIOT, - - - - -	Counsel for the Plaintiff.
E. MEREDITH, Q. C., and R. M. MEREDITH, - -	Counsel for Defendants.

EVIDENCE.

SILAS G. MOORE, the plaintiff, having been duly sworn, deposed as follows :—

To MR. ELLIOT :

- Q.—You are the plaintiff ? A.—Yes, sir.
- 10 Q.—You reside in the city of London ? A.—Yes, sir.
- Q.—Have resided for how many years ? A.—About 26.
- Q.—You remember the 2nd of October last ? A.—I do, well.
- Q.—Where were you that day ? A.—Belmont.
- Q.—You went from town here ? A.—I did ; I went through in the forenoon.
- Q.—Drive ? A.—I did.
- Q.—Whose trap was it ? A.—It belonged to McNames' livery.
- Q.—The trap and horse ? A.—Yes.
- Q.—What did you go to Belmont for ? A.—Fair day there.
- Q.—To see the Fair ? A.—When I went there I went there with the expectation of going on a
- 20 gate, but I was late when I got there, and they put another man on.
- Q.—Had you been previously engaged that way ? A.—Yes.
- Q.—Former years ? A.—Yes.
- Q.—What time did you leave there to come home ? A.—In the neighborhood of five o'clock.
- Q.—Was there anybody with you ? A.—Not going out ; Daniel Stewart came with me coming
- back.
- Q.—He was coming to London and you gave him a lift ? A.—Yes
- Q.—That was about five o'clock ? A.—Five when we left there.
- Q.—Do you remember approaching Maitland street ? A.—Yes, sir, I do.

Moore
Connecticut

Jury Council
exclaimed
Sup. Court

Judgment of Jury Council.

Undoubtedly, the Court has power to enter the verdict in accordance with what they deem to be the true construction of the findings. Can they, however, with other facts - which were taken as admitted or were so clearly proven that no controversy could arise about them? But it is not in the power of a Court to enter a verdict in direct opposition to the finding of the jury upon a material issue! and that is what the Court of Means Bench have done. If the only question for this Court is whether or not they take the same view of the evidence as the jury they might be disposed to say that the evidence on the part of the defendants is somewhat preponderant. But this is not enough to justify them in granting a new trial. To hold it that many would be in fact to substitute a Court for the jury. In order to be justified in granting a new trial they must be satisfied that the evidence so strongly preponderates in favor of one party as to lead to the conclusion that the jury responding for the other party have either wilfully disregarded the evidence or failed to understand and appreciate it.

Q.—Do you recollect what time that was? A.—We calculated it was about the time the Michigan Central would come on the Port Stanley track. That was one reason why we turned off on Maitland street.

Q.—About what time was that? A.—Between half-past seven and eight.

Q.—In the neighborhood of eight o'clock? A.—Yes.

Q.—You left the Hamilton Road and turned north on Maitland street? A.—Yes.

Q.—When you approached the railway track did you see anything? A.—I did not; it came along very quietly, and of course there are a good many tracks there.

Q.—Do you know how many? A.—No, I know there are tracks on both sides of the Grand

10 Trunk Station, and then they run cars in there next the Massey place.

Q.—Are there a dozen tracks? A.—I would say, take the both tracks, I would say six or eight may be more.

Q.—Both sides of what? A.—The tracks you would have to cross on Maitland street.

Q.—Both sides of this old station? A.—Yes.

Q.—At all events, coming at Maitland street to get across the railway, you think you would have to cross six or eight? A.—Yes, I should think it would be all of that.

Q.—You approached the tracks? A.—Yes.

Q.—Did you cross any of them? A.—We crossed past it all and we got on the main line, that is on the tracks north of the old Grand Trunk Station.

20 Q.—Then what occurred? A.—We saw no watchman there, or no lights or anything, and I supposed of course everything was safe.

Q.—You saw no watchman or any lights and you supposed the tracks were clear? A.—I did, and the first thing that I saw was the car backing up past the flag shanty.

Q.—The first thing you saw? A.—The first thing I heard or saw, and that was just about the time the horse made a spring. That is the time I supposed the horse seen it and he made a spring. I might have hit him there with the whip for all I know. I don't know whether I did or not, because they were so close on to it.

Q.—How far was the horse from this track on which this car came? A.—It was done so quick I could hardly tell. I know the horse did not get a scratch on him, but it tore the buggy all into

30 mince-meat.

Q.—Was the horse close up? A.—He must have been close up, because he was attached to the buggy.

Q.—Did you see this flagman's station? A.—As this car backed up was the first notice I took of the car at all, the first time I saw the car.

Q.—Did you see the flagman's station there? A.—I saw it there just at the same time that I saw the car.

Q.—Did that intercept the view? Could you have seen the train sooner if this flagman's station had not been there? A.—I could have seen the train earlier if there had not been some obstruction east of that.

40 Q.—Do you know what this obstruction was? A.—I could not tell whether it was freight cars or what it was. I know freight cars stand in there.

Q.—There was something? A.—There was something that we did not see; no light, nor no train or no signal.

Q.—Could not see anything until it appeared on the crossing? A.—Until it backed right past this flag shanty.

Perkins v. Danversfield

SILT 585
in Court of appeal

Under the rules of the Supreme Court after leaving any question to the jury the Judge has no power to give judgment contrary to the findings of the jury on a question so left to them, when therefore this was done by the Judge the Court of appeal ordered a new trial.

Merchants Bank

Boston v. C. J. August 1881. I am not disposed to throw a verdict found by a jury for the debt into a verdict for the plaintiff without the debtors consent but there may be a new trial (no questions put)

Then show that these findings are such that the verdict should have been entered for the plaintiff - or at all events could not be entered for the debtors without going directly against the findings of the jury

The only question out of the 11 which is answered in a manner doubtful is the first one (Read it) accordingly the jury have not found affirmatively that the bell rang, or that it did not; they have found that there was a man with a lantern standing on the rear of the car

Refer to Chap 104 RSC sec 67 about the bell to be rung or whistle sounded at least 50 rods from crossing. The Judge held that the train having started within 50 rods there was no negligence to be found

This point was raised in Holt v. St. Lawrence & Ottawa RR 10th 550 the objection was overruled and the ruling of the trial Judge was sustained to the effect (which seems most reasonable) that if the train started at a less

Q.—You were coming north? A.—Yes.

Q.—What occurred after the horse gave a start? A.—The horse made a jump and the first thing I knew I was picking myself up, and just as I was picking myself up I saw the man lift Mr. Stewart. He had a lamp in his hand, that man, whoever he was, and the horse was gone. At this time I got up on to my feet and I think the first question that was asked me was: Was I hurt bad.

Q.—Which side of the track were you on? A.—I was on the north side, and I think I was over every rail.

Q.—Was Stewart on the north side? A.—Yes.

Q.—Which side was the conveyance on? A.—The first time I seen it it was on the south side of
10 the track. That was the next morning; I did not see the buggy that night at all.

Q.—When you got up did you know that you were injured? A.—I did not know at the time. The first thing I seen, I think, if I am not mistaken, some young fellow said "your hand is hurt." It stunned me, so I looked at it. There was a scar there. It was cut and laid over across the finger, but I did not know that I was jammed up in the shoulder at this time, nor in the back. And the second day afterwards I was so lame that I could hardly move. That is the day I went down to see Mr. Larmour. He said he would look into it.

Q.—You felt the injuries afterwards? A.—I did.

Q.—When? A.—I felt them the next day, that was on the third. I felt them still in my back
on the third, and I was using the liniment that I had used for rheumatism on them.

20 Q.—Have you felt the effects of that since? A.—Yes, I have.

Q.—Where? A.—On this shoulder and down the right arm. It is nervousness most now.

Q.—You are a victim of rheumatism? A.—I am, in my feet and ankles. I have been since 1874.

Q.—How old are you? A.—62 past; I was born in 1828, 23rd July.

Q.—Always used the stick? A.—I have went on crutches or a stick since 1874.

Q.—You did not get any doctor? A.—No, sir; I did not.

Q.—You are an old soldier they tell me? A.—Yes, sir.

Q.—Sort of a doctor yourself? A.—I am; I have had to doctor myself a good deal, I tell you.

Q.—There is no doubt you received these injuries? A.—I received them. There is no doubt
about that at all.

30 Q.—What became of this buggy? A.—The buggy was left there on the track. I could not exactly tell you how long, but I saw Mr. Larmour one day and he says —

Q.—Never mind what he said; was it in consequence of what he said it was taken away?

A.—Yes.

Q.—How long after the accident? A.—I presume it was three or four weeks.

Q.—You say you did not see it that night? A.—No.

Q.—Did you see it the next day? A.—I saw it the next morning.

Q.—What sort of shape was it in then? A.—The two front wheels were broken; one of them, I think, had not a spoke left in it, and I do not know whether the other had or not.

Q.—What was the matter with the hind wheels? A.—One of them broke and the axle sprung.

40 Q.—Was it a top buggy? A.—Top all broke, and the dashboard and the bottom. You may as well say it was a total wreck.

Q.—You did take it to the wagon manufactory? A.—Took it to William Thompson.

Q.—I believe he told you it was not worth repairing? A.—That is exactly what William Thompson told me at the time.

distance than 80 Rods from the highway it was the more necessary to have because to these precautions the jury have expressly negatived contributory negligence - so that there is nothing found by the jury which is not decided for and in favor of the plaintiff, unless it be found in the answer about the bell - and that can only be, if the law is that unless the plaintiff can affirmatively show the ringing of the bell on a warning of the whistle was omitted.

But I contend that where as in this case the plaintiff swears he did not hear the bell, it devolves upon the defendants to prove that these precautions were taken this they have not done to the satisfaction of the jury. Besides I contend that even if the bell was rung at which I concede that does not dispose of the case as the Judge seems to have thought.

This is the case of Sett v. St. Lawrence Ottawa R.R. Mr. Justice Huggart approved of the remarks of the trial judge in calling attention to the effect of the divergence of a parallel or rail as an element in considering the danger of the crossing. This case in several respects resembles the present one and as C. J. Huggart said "the question was whether the accident was caused by the defendant's negligence and that negligence was the question for the jury." In Becher v. the London & Brighton R.R. 15 Common Bench N.S. 584 the plaintiff was a foot passenger & injured at a foot crossing by a collision. It was held that it was not obligatory on the Railway to place guards whenever a foot way crosses on a level. But said C. J. Earle the plaintiff's position which I divide in favor of the plaintiff on this occasion. Is that the great degree of risk incurred by persons crossing exercising their ordinary rights on this particular spot owing to the large number of trains passing the sharpness of the curve, and the obstruction of the view caused thereby and by the adjacent bridge should have induced the Company to exercise more vigilance, Keating, Byles & Smith the other Judges all agreed that the frequency of the trains, and the other circumstances, called for more vigilance than the Company seem to have exercised.

Mr. MEREDITH objects.

Q.—What became of the horse that night? A.—The horse was caught on the corner of Maitland and York.

Q.—That would be just the next block? A.—Yes; I think his name was Mann caught him and the young man brought him back to me where we were.

Q.—Near the railroad? A.—Yes.

Q.—Was he taken to the stable? A.—I took the horse from there to the stable myself.

Q.—Was Mr. McNames at the stable? A.—He was there at the time I got there.

Q.—At what pace were you driving when you approached this railroad? A.—We were driving 10 slow, and driving slow all day, from there and back, which Mr. McNames will tell you; the horse was perfectly cool when I got him to the barn.

Q.—Did you stop on your way from Belmont? A.—Yes, we stopped at James Homister's and Mr. Stewart thinks we stopped at ———

Q.—Never mind what he thinks, you stopped there? A.—Yes.

Q.—Did you stop anywhere else? A.—We stopped at Nilestown and tried the horse with water.

Q.—Did you drive a moderate pace? A.—Yes, all the time.

CROSS-EXAMINED BY MR. E. MEREDITH:—

Q.—What is your occupation? A.—I am agent for John Elliott & Son, sitting in the show room down here.

20 Q.—Were you engaged in that business at the time of the accident? A.—No, sir.

Q.—What business were you in then? A.—Nothing at all particularly.

Q.—What did you say the date of the accident was? A.—The night of the 2nd October.

Q.—You were doing nothing up to what time? A.—Doing nothing only these little odd jobs, and get collecting, and like that.

Q.—When did you get the employment of sitting in Mr. Elliott's place? A.—If I am not mistaken it was the 29th January.

Q.—You were out to Belmont that day? A.—Yes, sir.

Q.—At the fair that day? A.—Yes, sir.

Q.—Drinking? A.—I do not think I could drink much because there was none on the ground.

30 Q.—Were you? A.—No, I was not.

Q.—Had you been drinking at all? A.—I do not know whether I had a drink in Belmont or not. I would not swear whether I had or not.

Q.—Up to the time of the accident how many glasses had you on that day? A.—I had two glasses.

Q.—Will you swear you had no more? A.—I will swear I had two and I do not know but I had one in Belmont.

Q.—Not any more? A.—No, no more that I can recollect.

Q.—Three glasses of liquor would not make you intoxicated? A.—No, sir.

Q.—No doubt about that? A.—Well, I know it won't.

40 Q.—You were not the worse of liquor? A.—No, sir.

Q.—Neither at the time of approaching the train or afterwards? A.—No, sir, not even when I got to the barn.

Q.—If the people say there was a strong smell of liquor on you, how do you account for that? A.—The last liquor I had was at James Homister's. There was two glasses there.

ought him and
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were driving
the horse was
Tomister's and

the show room

little odd jobs,
-If I am not

A.—I had two
not know but I

... even when I
... count for that

- Q.—That was how long before the accident? A.—Just drove from Homister's there.
- Q.—These two glasses kind of livened you up? A.—I do not think it.
- Q.—No effect on Moore at all? A.—No, no more than it is on you to-day.
- Q.—Did not make you feel good? A.—No.
- Q.—Was it whiskey? A.—I think it was whiskey; good whiskey too.
- Q.—Pretty good horn each time? A.—It was not a big horn; I do not take them.
- Q.—How many horns had Stewart? A.—He had the same at Holmsters that I had.
- Q.—Stewart perfectly sober, too? A.—Yes; I can vouch for it.
- Q.—Even if you were tight Stewart was sober? A.—Yes, sir, Stewart was sober if I was tight.
- 10 Q.—After the accident they told me you did not know who was with you? A.—I might have asked "where is the man that was with me."
- Q.—Did they ask you who was the man that was with you, and did you say you did not know?
- A.—No, I never said that; they might have asked where was the man.
- Q.—Do you recollect being asked who was the man that was with you, and you saying you did not know? A.—No such question ever asked me; they might have asked "where" the man was.
- Q.—You said you did not know? A.—I did not know at the time.
- Q.—It was not that you were in that state that you were oblivious to what had happened? A.—From being tight?
- Q.—From the worse of liquor? A.—No, sir, I was stunned a little.
- 20 Q.—I am told by Dr. Moore that Stewart was very much the worse of liquor; what do you say to that? Dr. Moore is a respectable man? A.—Yes, sir, I went for him myself for Mr. Stewart.
- Q.—Do you still say he was sober? A.—I say he was sober as far as I seen. I only seen him drinking what he drank with me.
- Q.—What time in the evening did this happen? A.—I should calculate it was in the neighborhood of a quarter to eight.
- Q.—You were crossing at Maitland street? A.—Yes.
- Q.—You cannot tell us how many tracks there are that you crossed before you say the accident happened? A.—I never counted them.
- Q.—The rig was a covered buggy? A.—Covered rig.
- 30 Q.—Coming along were you talking to each other? A.—We were.
- Q.—In crossing the track were you talking to each other? A.—We might have said something or other.
- Q.—Were you conversing with each other crossing the track? A.—We were talking right along, and if I am not mistaken Mr. Stewart says —
- Q.—Were you talking as you were crossing the track, one to the other? A.—I presume we were.
- Q.—Do you recollect the subjects you were talking about? A.—No, not on the track, I cannot. I can before we got there. I do not know whether we got there with that subject or not.
- Q.—You were still talking as you were crossing these tracks? A.—We might have been. I do not know whether we were or not.
- 40 Q.—Which way were you looking? A.—Right straight ahead all the time.
- Q.—Which way were you looking? A.—I suppose I was looking to the north; I was not looking any other way.
- Q.—In crossing in this covered rig you had your eyes simply straight to the north. A.—I had my eyes straight to the north. It was a covered buggy with the top half taken down.

It was an appeal from a Compt Camt C. J. & Co.
said in answer to the ~~the~~ statement that blowing
off steam was necessary. I am of opinion
that the evidence abundantly shows that the Company
by their servants have not used the railway with
that attention to the rights and safety of the Queen's
subjects which under the circumstances they were
bound to exercise.

Longmore v. S.W.R.C. 19 Cam Bench Trs. 184 where the
damages claimed was for an injury sustained by a
passenger whose death was caused by the fault
construction of a bridge although there was a
safe one about 100 yards further off which the plaintiff
might have used. Keating J. left it to the jury whether
or not the company had been guilty of negligence in providing
a bridge for the use of the public that was not
reasonably safe, the Master said Ex. C. S. seems
to me to have been one peculiarly fit for a jury viz
whether the defendants exercised reasonable care & caution
in the construction of this bridge which passengers
going to the Railway were made to use.

Rosenburgh v. G.R. 31 C. P. 349 & 41 R. 402
9 J. P. R. 311 was upheld on failure to sound the bell
or the whistle applied to damages only by collusion
or the whistle applied to damages only by the noise. Need the latter
to fight off horse by the noise. Need the latter
by all the judges except C. Wilson & Burton
this case has little bearing on the matter it is only as
to sounding the bell or whistle - but it shows that the
finding of the jury is a guide.

Brown v. G.R. 406 52 T. 122

Injury by collision at a level crossing. In the authority
of Lacey v. London S.W.R. 11 213 R. 213 where the plaintiff
was injured by a train which he was not told of the crossing.
The defendant said that the crossing was not a level crossing
but he said understatingly that whenever they are dangerous
it was the duty of the railway to take precautions to prevent
accidents which have happened by the necessary precautions to
enable them to do so. The plaintiff sustained the duty
of a Justice Bowen said "where there are two reasonable
constructions one in favour of the plaintiff & the other in favour of the
defendant it is for the jury not for the judge to draw the inference."

Skellton v. London N.W.R. 22 R. C.P. 131 there was an accident
which was sustained on the ground that the injured party
contributed to the accident. ~~was not a contributory~~
as had he looked (which he did not do) he could have
seen what was coming. But both Miles & Montague Smith
said that there were many cases where circumstances of
exceptional cases would require additional precautions
beyond those imposed by statute.

Q.—Were the sides down? A.—I do not think there was any sides on it; I do not think the wings were on it.

Q.—Are you sure about that? A.—No, I am not sure about it, but I am almost positive.

Q.—Were you on a trot in crossing the track? A.—Yes, I presume we were on the trot and the horse jumped.

Q.—It was dark? A.—It was dark that time of night.

Q.—It was dark in that locality? A.—Certainly; any man could have seen a lamp if it had been there.

Q.—It was dark, you were crossing these tracks and talking to Stewart and looking at the same time to the north? A.—I was looking the width of the street to see there was no cars in the way.

Q.—Your horse was on a trot? A.—Yes.

Q.—You told me you were looking to the north? A.—That would be north, the width of the street.

Q.—You were upon a trot then, and at the time the accident happened your horse made a spring? A.—Yes, he made a spring, that is one thing sure.

Q.—It was a still night; no noise in that locality? A.—I cannot recollect that—whether the wind was blowing or not.

Q.—There was nothing to prevent your hearing? A.—Nothing more than our buggy would have made.

20 Q.—There was nothing to prevent your hearing? A.—I do not know that there was anything to prevent us hearing. Cannot say as to that, I am sure.

Q.—If it was simply the noise that your buggy made you would be able to hear anything that was coming along? A.—You might and you might not as far as that is concerned.

Q.—You know what noise your buggy made? A.—No, cannot quite tell how much noise a buggy makes.

Q.—As a prudent man, do you think it was a wise thing for a man to drive upon a trot crossing these tracks a dark night without any light there, looking simply to the north? A.—I think it is a prudent thing for a man crossing a track—

Q.—Do you think it was a prudent thing to do? A.—If I did not think it was prudent I would 30 not have done it.

Q.—You saw there was no watchman there? A.—Yes.

Q.—You saw that as you were crossing the track? A.—Yes.

Q.—It was a dark night and you still kept on with your trot? A.—I presume it was a trot.

Q.—Do you think, as a man of experience and a man of age, and a man that has been through the American War, that that was a prudent thing to do, and it is a thing you would have done if you had been free from liquor? A.—I should have done the same thing if I saw there was no watchman.

Q.—You knew as a matter of fact, you have lived in this city, that trains are shunting all the time across this crossing? A.—I know that, and I know that they have got a watchman on the street, too.

Q.—You knew the watchman was not there that night? A.—I did not.

40 Q.—You saw the watchman's shanty was dark? A.—I did not know it till after. The watchman's shanty is between the main line and the old Grand Trunk Station.

Q.—Which side of the track is it upon? A.—On the east side.

Q.—On the north or south side of the track? A.—On the south side of the main line.

Q.—Then you would be some distance from the track where you were struck, and you would have seen the shanty before you were struck? A.—We were not close enough to it.

Wright & The Midland R.C. 12T 2406 where this case is
very fully debated. The Divisional Court had held that
Mr Justice Butler should have withdrawn the case from the
Jury. It was for a collision at a level crossing where
the fault was clear. The Judge of the Div Ct was set aside
as stress is laid on the point that no power was at the
level crossing to warn passengers although it was usual
to have one there. Said the Master of the Rolls. It is
not reasonable to come on the part of the R.R. Co. in
the night time to leave that level crossing not very
level crossing under the circumstances without any
one to warn the passengers how near the train may
be. It is so clear that it is perfectly reasonable, not
to have anybody there that a jury would not find
with the contrary. He further says as to seeing a light on the
engine (thence it would be the train) approach
"can a judge venture to say as to seeing a light at night
under these circumstances must see how close the
train is to him, or might be although he saw the light
reasonably come to the conclusion that it was at such
a distance off that he might safely cross without danger
that I venture with great respect to say no judge has a
right to form his judgment upon". Judge of Div Ct refused
should the case show a have been left to the Jury.
Lindley dissenting. This case is strong to show the stress
that is laid on the absence of a customary power
to warn of all the circumstances and that the whole
case should have been left to the Jury as there was room
for difference of opinion.

Bentley v Lancashire & Yorkshire R.R. 3LT 12 146
Accident on a level crossing. A man was killed attempting
to cross went under a train standing in the way said
to be at the usual crossing place. Had it for itself
a new trial was granted on the ground that the case was
too vaguely left to the Jury Counsel for the Peff said
"there were many circumstances. When there was not
negligence on the man's part." Mr Bannard had also
said "then they ought to have been left to the Jury it was
for them not for us to decide. He further said. It must
depend upon all the circumstances which ought to have
been left to the Jury". But they have not been left
to them & indeed the case has been left vaguely
loosely to them. This case shows two things
1 that all the circumstances bearing on the case should
be submitted to the Jury
2 Upon them it is for the Jury to decide

Q.—You saw as you were coming along that there was no light in the watchman's shanty? A.—No, there was no light in the watchman's shanty.

Q.—You saw no watchman there? A.—There was none there.

Q.—Observing that, why did you continue your trot? A.—Simply because I thought there was no cars on the track or there would be a watchman there.

Q.—Then it boils it down to this: you continued upon a trot for the simple reason you saw there was no watchman there? A.—If I was on a trot.

Q.—Simply because you saw no watchman on the track you said to yourself the thing was safe? A.—That is the way I looked at it.

10 Q.—And simply continued on a trot and looking to the north? A.—I was looking the width of the street to the north.

Q.—Did you strike your horse with the whip before you were struck? A.—I cannot tell you whether I struck him at all or not. I say I presume I struck him; he made a spring first, and when I saw the train I presume I struck him; if I did not he would have been cut in two.

Q.—Do you recollect whether you struck your horse with the whip or not before the accident happened? A.—I could not swear.

Q.—Although you can say you heard no noise? A.—I heard no noise or any signals.

Q.—How far would you be south from where the accident happened when you say the cars approached? A.—I think the horse was direct on the line that the train was backing on; I think he 20 was right on that side track that they were backing in on before I saw the cars at all.

Q.—When you saw the cars how far east were they from you? A.—I could not tell the number of feet.

Q.—Twenty feet? A.—Ten or fifteen, somewhere there.

Q.—Then you saw these cars backing down ten or fifteen feet east from you? A.—It might have been.

Q.—Did you attempt to pull your horse back? A.—I could not pull him back for the simple reason that he jumped.

Q.—Did you attempt to pull him back? A.—I do not know whether I did or not; I do not know but I did.

30 Q.—The train was backing down very slowly? A.—I do not know as to that; I was not on it.

Q.—You saw it coming down? A.—You stand and look at the tail end of a train you cannot tell how fast it is going.

Q.—You could tell whether it was going fast or not? A.—If it was standing still you could.

Q.—I am told one of the men that was on the train jumped off and took your horse by the head? A.—He never done it.

Q.—And that you urged your horse on? A.—I say there was no man took that horse by the bit that I seen.

Q.—Will you undertake to say that before you reached the track upon which the train was that one of the men did not come up to you and catch your horse by the head and you still urged the horse 40 on? A.—I never seen nor never heard him.

Q.—You won't say how that was? A.—I say if he did I never seen or heard him, and if a man caught a horse by the head that I was driving I would see him.

Q.—Will you say it did not happen, that this man did not catch your horse by the head before it got upon that track and that you still urged your horse on; will you say that did not happen? A.—I do not believe it did. I will say this, if it did I never saw and never felt any jog in the horse.

Shabazz v. R.R. 1901 12 16

The learned Chancellor remarks upon the danger
at a level crossing rendering the travelling hazardous
& said the Jury have therefore thought it to be a place
where for two fold reasons great precautions should
have been used"
(only to show the necessity)

^{XVI}
James v. R.R. App R 37 Decd before G. A. J.
re: death of J. H. Smith for death & damages in the D. C. Ct
Deceased (Robertson 2). But at App reversed that decision
Haffert dissenting - on the ground that the carelessness
of the deceased caused the accident (Killed by shunting
engine) but left 3 questions to the jury 1. Was there negligence
in the manner in which the shunting engine was moved
Ans Yes. Was the defendant negligent in leaving the
blank track crossing between the rails in order to get
round the cars Ans No. 3. As to damages might for
death for \$2000

This is one of the strongest cases against us.
But held that there was no imputation & no necessity
for the deceased to elaborate from the provided & usual
may. McKellan said "a single step would have saved him
(the projecting buffer of the engine was blamed). The
head light was shining the bell was ringing engine
moving 2 or 3 miles at hour the deceased brought it on
himself. Haffert dissented & said "I desire to put a
myself from deciding unnecessary here that it is
essential to the right to recover to prove specific negligence
in the management of the shunting engine beyond that
which is run over & injure the passenger". Haffert then
it was for the jury.
The point taken here is no necessity to cross

Mein v. Canadian Pacific XX 1 App R 100 Decd J. A. J. said
I certainly do not mean to lay it down that it is the duty
of a traveller on approaching a railway crossing to get out
of his vehicle & examine the line before crossing it.
If that was the law he could hardly ever cross without
his own will for by the time he had made one examination
was ready to proceed it would be said he ought not
to cross until he had made another & so ad. in fact
But he goes on to say he is to use such faculties of sight & hearing
as he may be possessed of - was he ever faulted by the
Court? No.

Q.—When you were at least fifteen feet from the track did you hear a man shout as loud as he could, to be heard a block off, for you to be careful? A.—I did not.

Q.—That thing did not happen? A.—I do not know, if it did I did not hear it.

Q.—I have a witness here that was a block away that heard it at that distance, what do you say to that? A.—I did not hear it.

Q.—If it could be heard a block away it could be heard by you. Will you undertake to say that did not happen at least ten or fifteen feet from where you were approaching that crossing? Will you undertake to say that there was not a man shouting out as loud as he could, and so loud that it could be heard a block away by Mr. Heaman, a wood dealer? A.—I will undertake to say Mr. Heaman was not
10 a block, he was only across the track in his office; he told me like this, he was sitting in his office and he heard a crash and hallooing.

Q.—Did you hear any hallooing? A.—I did not.

Q.—Was it for the reason that you were talking to Stewart? A.—No, I think it was the noise of the buggy, if anything, rattling over the tracks.

Q.—If you had been walking there would not have been this noise? A.—No.

Q.—A prudent man, you chose to drive over this railway on a dark night at a trot? A.—A man gets over the track as fast as he can.

Q.—You think it is a prudent thing for a man to trot over it? A.—Yes, most all do.

Q.—The rumbling of this train makes considerable noise? A.—It might make some.

20 Q.—Don't you know the rumbling of a train makes considerable noise? A.—It makes some.

Q.—You did not even hear the rumbling of the train? A.—I did not

Q.—Do you mean to say if you had been paying the slightest attention you would have heard the sixteen cars and the engine. That would make considerable noise? A.—It would make considerable noise.

Q.—Could be heard much better at night than in the day? A.—I do not know that.

Q.—Do you mean to say you did not hear the rumbling of this train coming down? A.—I did not hear any noise or anything till I saw the tail end of this car.

Q.—If you had been paying the slightest attention is there any reason in the world why you did not hear the rumbling of that train? A.—I took it for granted everything was all right because there
30 was no watchman there.

Q.—You took it for granted and paid no attention and that is the reason you did not hear the rumbling of the train? A.—That is the way you put it.

Q.—You took it for granted, and there being no watchman there, that everything was safe, and you paid no attention? A.—I did pay attention to get across the road safe.

Q.—You said you paid no attention and that is the reason you did not hear the rumbling of the train, is that so? I want to get your own honest, fair statement? A.—That is all right. I told it to you as plain as the English language can tell you.

Q.—Is that so, you took it for granted everything was all right, and you were not listening for any noise? A.—I did not tell you I was not listening for any noise.

40 Q.—Not seeing the watchman there you were paying no attention, thinking everything was safe? A.—That is so.

Q.—The watchman not being there you were paying no attention, and took it for granted everything was safe. Now, do not you admit you were feeling a little merry? A.—I want you to distinctly understand I was sober.

Q.—I am putting it a little more moderate, a little glib? A.—No, I was not glib.

Edgar & wife v Northern R.R. 41 App R. 450

Barton J said "The Counsel for the plaintiff labored at measure some light on a point which admits of no question at the present day namely 'that there is any evidence from which negligence may be inferred it is for the jury to deal with the question'."

Peck v G.R.R. 10 App R. 191

A plaintiff at a railway crossing by collision in verdict for plaintiff sustained.

The accident occasioned a collision in crossing a R.R. the jury found the death was due to negligence in not ringing the bell and a negligent contributory negligence, verdict for plaintiff sustained by Ct of App. Cameron dissenting who learned that there on duty.

London v S.W. R.R. 11 2B 213 affirmed 12 2B 70 which is to the effect that plaintiff must establish absence of negligence on his part.

This case shows that even if the fact was not ringing plaintiff may have been negligent
Say that the corollary duty is held that even if it was sudden that does not relieve the Co of negligent in their respects; this case shows that it is for the jury (not over strong)

And v G.R.R. 24 CP 347 shows that blowing of whistle near a highway crossing frightened the horse & injured the plaintiff jury found for plaintiff verdict for plaintiff sustained
It was an admitted among under the circumstances

Munyan v London & Western R. 5 LTR 598 7 News Digest for 1889 p 30 535P. Accident from a collision of a train & carriage the Chief Justice pronounced on the ground that there was no evidence of specific negligence But the Director pronounced as to. It was in this case that Mr Justice Denman ^{again} asked questions of negligence had perplexed and misled the judges & thus shown that they were for the day.

Q.—Upon that occasion you were perfectly sober? A.—Yes.

Q.—Are you in the habit of getting off occasionally? A.—Did you ever see me off? I was sober, I tell you.

Q.—Are you in the habit of getting off occasionally? A.—No, I am not.

Q.—Sometimes? A.—No, not sometimes either.

Q.—Once? A.—I got full once.

Q.—Upon this night it was not the occasion? A.—No, I was sober that night.

Q.—Were you in any other taverns in Belmont? A.—Yes, I stopped at Jack Charles'.

Q.—Good deal of drinking going on at fair time? A.—If there was it did not interfere with me

10 any.

Q.—You had hosts of friends there? A.—If I had I did not use them.

Q.—Did they use you? A.—I could not find any fault with them.

Q.—Did they use you? A.—What do you mean?

Q.—By treating you? A.—No.

Q.—Old friends; one would think that would be the occasion of a little rejoicing? A.—I do not know that they are old friends of mine there any more than any where else.

Q.—Who owned the buggy? A.—Mr. McNames.

Q.—Did you speak to Mr. McNames about bringing any suit for the buggy? A.—I think I did; I am not sure, but I think I did. He put in his valuation to me.

20 Q.—Did you speak to him at all about bringing a suit against the Company for the buggy? A.—I think I did.

Q.—Will you swear you did, because I have got your evidence here? A.—I do not know that the question was asked me.

Q.—Did you speak to him? A.—I think it was talked of before he went away.

Q.—Will you swear whether it was or not? Did he authorize you to bring any suit for the buggy? A.—Not for himself, he did not. He holds me for the buggy.

Q.—He could not collect anything out of you, talking fairly and squarely? A.—I know I am a poor man.

Q.—That amount could not be collected from you? A.—I do not know whether it could or not.

30 Q.—You have not any property to make it out of? A.—No.

Q.—You are unfortunately subject to rheumatism? A.—I have had rheumatism; got it yet.

Q.—Had it in the hands? A.—I had it in the hands; I got rid of it in my hands twelve or thirteen years ago. It does not bother me now; has not for a number of years.

Q.—Which shoulder was it that this funny feeling was in? A.—Right shoulder.

Q.—And the back? A.—It got all right.

Q.—Any rheumatism in the right shoulder? A.—Never felt that shoulder out of place or feeling wrong till after the accident.

Q.—Quite sure there was no rheumatism there? A.—I am; I ought to know if there was.

Q.—Never had this tickling sensation? A.—Never had it till then.

40 Q.—This tickling sensation has been bothering you ever since the accident? A.—Yes, sir.

Q.—Where is it? A.—It is in my hand.

Q.—There is rheumatism in your hand now? A.—No, sir.

Q.—You said in the examination that you did not know whether it was rheumatism or the accident? A.—I said it might be rheumatism, but if it was rheumatism it never bothered me before in that shoulder.

Bichee v London Brighton & Coast R.R. 18 Com Bench
N.S. 585

Held properly left to the jury was the negligence on the part
of the defts. The Ct. said "that the great degree of risk
owing to large numbers of trains passing and the
obstructions of the river should have induced the
company to exercise more vigilance."

Keating J. said "the peculiar danger of the spot in question
called for the exercise of greater caution on the part of
the company than was shown"

The accident occurred at a level crossing by collision.
Held that it was properly left to the jury considering
all the circumstances whether or not the company had
been guilty of negligence by not providing adequate pre-
cautions - Verdict for plaintiff sustained.

Stubbs v The London & N.W. R.R. 12 R. & 13 where it was held
that there is no general duty on Railway Companies to place
watchmen at public footways crossing the Railway
on a level but it depends upon the circumstances
in each case whether the omission amounts to negligence
on the part of the Co. - non est peremptory to be
resisted - sufficient precautions & accident owing
to plaintiff's carelessness -

Lamb v The London N.W. R.R. 12 R. & 13 277
where the R.R. gate keeper told plaintiff he could cross &
there was damage by collision - Shows the importance
of such a keeper so that plaintiff could have inquired
of him whether it was safe to cross.

Clarke v The Midland R.R. 43 L. Times 381

That the absence of a customary watchman at a box
was a distinct breach of duty which amounted
to negligence & contributed to the accident

Hagen v N.E. R.R. 24 L. Times 904

That the duty of a R.R. Co. to take reasonable
precautions at a level crossing

Q.—You were not quite sure whether it was the rheumatism or the tickling sensation? A.—The jar is what caused it.

Q.—Was there any mark at all upon the shoulder? A.—No.

Q.—Any mark upon the back? A.—No.

Q.—Although this tickling sensation has been going on how long? A.—Three or four days after that the pain commenced leaving my back.

Q.—It has been going on more or less ever since? A.—Yes, nervousness of this hand and arm.

Q.—Did you go to the doctor? A.—I did not.

Q.—If you thought you had received any injury would not you have gone to the doctor? A.—I do not think I should as long as there was no bones broken.

Q.—Then you did not think much of this tickling sensation? A.—I did not think much of it.

Q.—You did not go to the doctor for that reason, and you were not quite sure whether the tickling sensation was the result of the rheumatism or the shock? A.—I am quite satisfied it was not rheumatism; it never acted like rheumatism.

Q.—How much money do you think would stop the tickling sensation? A.—I have not any idea.

Q.—Would about \$10 cure that? A.—I do not think it.

Q.—You might have got cured by a doctor for \$1? You never went near a doctor so as he would be able to state to the jury what the injury was, if there was such a thing? A.—I did not go to a doctor at all; I have paid out money enough to doctors.

20 Q.—Is not this tickling sensation just to tickle a little money out of the Grand Trunk?
A.—No, sir.

Q.—Oh, come? A.—No "Oh, comes" about it.

Q.—There was a little scar on your finger? A.—Yes; it is there yet.

Q.—Do you recollect seeing this gentleman here, who represented the Grand Trunk, and telling him you received no injuries at all? A.—I recollect telling that gentleman when I first landed that I did not know that I was hurt at all.

Q.—Did you tell him you had received any personal injury? A.—I do not think it. I will swear I said like this, that when I was first hurt I did not know I was injured at all.

Q.—He was speaking to you a month afterwards? A.—I do not know that gentleman at all.

30 Q.—A month afterwards did not you tell him you were not hurt at all, except a scar on your finger? A.—I do not think it.

Q.—Do you undertake to say on your oath that you did not say that? A.—I do not think that I did.

Q.—Did you tell him that? A.—I do not think I did.

Q.—Will you undertake to pledge your oath you did not? A.—To the best of my recollection I would not swear I did. If I made that statement it would not be right.

Q.—Did you tell Mr. Logan that? A.—No, it was him and Mr. Logan was in my house the other day. I told them the first go off I did not know I was hurt at all.

40 Q.—Did you tell him you were not hurt then, but you found out you were hurt afterwards? A.—I told the two together. I was talking to Mr. Logan. I said it was a black moustached man I was talking to on the track, and I do not know but what you are the man.

Q.—Did you put any stuff on your shoulder? A.—Yes, a liniment.

Q.—Used for rheumatism? A.—Yes, it is a good liniment.

Q.—It was for rheumatism it was used? A.—I have used it for rheumatism.

Q.—You thought this was rheumatism? A.—No, it was just what I had in the house.

Rowell Hall 5 I.B. 31 597 at page 601

Polmann I said "the people protectively the common law and nothing adverse to their rights to one can be drawn from the statutes the statutes do not make it lawful to damage property without paying for the injury and in McLaren & Canada Central 32 W.C. Com Plea 345 Nelson C.J. cites this observation with apparent approval.

Reeseburger 4 R.R. 32 W.C. C.P. at page 362

Pol. I. said "I can only say that a crossing at a grade has always been considered a place of special danger & the approach thereto of trains required to be signalled, why to warn persons about to cross or approaching a crossing or using the highway in the vicinity of a crossing,

St Denis & Baxter 211 R.R. Rep. 44 an action for a wrongful demise there were four questions left to the jury one of them was "was the peff pt to do the duties of a Captain; the answer to this was "it has not been satisfactorily shown by the evidence, the other questions & the jury added to these answers a rider to the effect that the peff did not deem sufficient notice & occurred a verdict of \$1000 on this C.S. Nelson wrote a verdict for costs.

Boyd Ch. was of opinion all the answers showed he looked at what the peff intended for deft was wrong & that all the answers showed he had not at all provided for what the peff intended - conceding that the most important question was the pt. should have been satisfactorily by the peff which had not been done.

This case shows the Chancery view that the omission to answer one piece has not done away with the necessity of considering all.

Hanwell 4 R.R. W.C. C.P. 86

Negligence at a R.R. crossing Drake C.J. said in relation to the requirements about sounding the bell or whistle "I do not interpret these provisions to mean that if the Company have in their locomotives a bell or a whistle or ring the one or sound the other they are consequently held responsible for damages that may be occasioned by the use of ~~the~~ their locomotives upon the Railway. But rather to make it imperative that these precautions shall be adopted, that the absence of them shall impute any person suffering damage from the neglect or omission to observe the precaution, this may be many other acts of negligence which will impute a sufferer to compensation though the requirements are factually filled."

Q.—What you said to Mr. McNames in your examination was this, Where is McNames now? I do not know, he left here, I guess, a couple of months ago. Do you know where he went to? He is off on the other side somewhere in the States? Yes. Did you ever have any communication with him in reference to it? If I had I would know where he was. He never told you he was going to make you pay for the buggy? No more than what he told me before. He was in the livery business? Yes, since then he has sold out. You said this was between seven and eight? Yes. That was sworn to how long ago, about a week ago or ten days ago? A.—I think it was last Thursday, but that is not the way you asked me the question.

Q.—Have you paid him anything for the damage? No, sir, the buggy stands just as it was
10 broken. Is there any arrangement between you and him as to the damage? No, sir; the buggy stands just as it was broken. This was a livery horse? A.—Yes.

Q.—The horse was not injured at all; there is no claim made for the horse? A.—No, he never got a scratch on him.

Q.—Had you ever driven him before? A.—Never in my life.

Q.—Did he appear to drive quiet that day? A.—Yes, would not ask for a gentler horse.

RE-EXAMINED BY MR. ELLIOT:—

Q.—My learned friend tries to make great sport out of this tickling sensation? A.—Yes, sir.

Q.—To you, I suppose, it is pretty serious? A.—Yes, sir.

Q.—My learned friend has endeavored to mystify you in regard to these tracks. I have just got
20 a little sketch here; these are the tracks? A.—Yes.

Q.—This is Maitland street and this is the switchman's box? A.—Exactly.

Q.—Does the plan give you an idea of the street and the tracks? A.—I do not know the width
of that street. I paced one street, that is Talbot street; it is 40 feet across Talbot street.

Q.—Is the switchman's shanty on the east side? A.—Yes.

Q.—Close to the road? A.—Right close to the road and close to the track.

Q.—Is it close to the track upon which this car appeared? A.—Yes.

Q.—How close? A.—I think the rails just give room enough to pass right along with a freight car.

Q.—Is the track to the north of this house? A.—Yes.

Q.—Supposing the horse's head were right beyond the first rail, your carriage would be right
30 opposite this house? A.—Yes.

Q.—So when my learned friend talks about passing that house and seeing no light there, you should then take steps to prevent this accident. That is impossible? A.—Yes.

Q.—Could you see through the board there or through the chimney? A.—No, nor through freight cars either, whatever obstruction stood there.

Q.—This was a covered buggy? A.—Yes.

Q.—Was the cover up? A.—The cover was half way down.

Q.—Did that intercept the view at all? A.—No, I do not think it.

Q.—Did it prevent your seeing just as well as you could without? A.—No.

Q.—My learned friend has endeavored to make you say that inasmuch as you did not see the
40 watchman there you took it for granted everything was right, and you did not look out for danger at all? Is that what you wish us to understand? A.—I want you to understand like this, that seeing no watchman on the crossing I felt it was perfectly safe, and I heard no noise of any kind.

Q.—You did not, in consequence of no watchman being there, shut your eyes? A.—No, sir.

This shows that independently of the bell or whether
may other circumstances have to be considered
In fact the Railway is accountable like any
one else at Common Law for negligence even
though the statutory requirements have been filled

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A.—No, sir.

Q.—Did you still continue to look out for the train? A.—Why, certainly. I was watching the track up to the time this horse made a spring.

Q.—You are not able to tell us exactly how far the horse was from the car? A.—No.

Q.—You did tell my learned friend that the car was from 10 to 15 feet when you saw it? A.—It might have been.

Q.—This is east of the road or east of the middle of the road where you were? A.—East of where the buggy stood.

Q.—How in regard to the road allowance? A.—The road allowance there is only just the length of a plank. I do not know but it may be two planks there.

10 Q.—How far east of the plank was the car? A.—It might be ten or fifteen feet.

Q.—In the space for the road itself? A.—That is the width of any street.

Q.—Do you mean us to understand it was ten or fifteen feet east of the road allowance? A.—No, ten or fifteen feet from where the buggy was crossing.

Q.—That would be the centre of the street? A.—Yes; I do not know whether it was in the centre or not.

Q.—Then, as a matter of fact, this car was on the road when you saw it? A.—Yes; it was backing right straight into us.

Q.—It was on the street you first saw it? A.—Yes.

Q.—You told my learned friend that the horse was on the trot? A.—Yes.

20 Q.—Do you know whether there is greater danger crossing a track on a trot than on a walk? A.—I think there ain't so much.

Q.—Was it a slow trot? A.—It was a slow trot I know, if it was a trot at all at the time, because I know we did not drive fast

Q.—People crossing a track as a rule do not get down to a walk? A.—No.

RE-EXAMINED BY MR. E. MEREDITH:—

Q.—How far to the east is the watchman's shanty? A.—That question you asked me before, and I told you about ten or fifteen feet.

Q.—If you were driving along there, looking to see if the watchman's shanty was lighted, you would see it at a considerable distance; you saw that didn't you for some considerable distance? A.—

30 I did not say I saw it at a distance at all.

Q.—Could not you if you had looked? A.—I do not know that I could, dark as it was.

Q.—The watchman's shanty would be open with a light in it? A.—There was no light in it.

Q.—If you had looked you would have seen whether there was a light in the shanty or not? A.—That is very true, no doubt.

Q.—If you had looked before you got upon the track you could have seen this watchman's shanty and that there was no light there? A.—That is a question.

Q.—There was nothing to prevent you? A.—I do not know but there was.

Q.—Did you see the light there? A.—I looked to see if there was lights on the track.

Q.—Did you look to see if there was a light in the watchman's shanty? A.—I do not know that
40 I looked to the watchman's shanty or not. I looked the width of the street.

Q.—You took it for granted there was no watchman there? A.—I took it for granted there was no danger.

Liability of R.R. Co. independent of statutory enactments

A Railway Company is liable for damages by Common Law independent of statute.

Oshorne v R 21 Q.B. 220 where plaintiff recovered damages by a fall on the slippery steps leading to the station.

There is no statutory enactment in regard to the Bickett v R.R. 8 Q.B. 601 App 13 page 184. Haggart v Wilson & I said that "independent of any statutory enactment the duty must be imposed by the ordinary rules governing ordinary vehicle."

Brown v G.R.R. 12 T.R. 406. Injury by collision at a level crossing. Judge on authority of Davy v London & S.W. R.R. Co. 11 Q.B. 313. Where plaintiff fell from a cart set aside near a level crossing. The D.C. 12 T.R. 615-7. (Hain v.). In the D.C. said "level crossings have been authorized by statute but he said notwithstanding that whenever they were dangerous it was the duty of the R.R. Co. to take special precautions to prevent accidents, & whatever might be the necessary precautions to make them safe do so."

The R.R. Co. which sustained the D.C. had a further burden said "where there are two reasonable constructions, one in favor of the plaintiff & the other in favor of the defendant it is for the jury & not for the Judge to draw the inference."

Ketton v London W.R. Co. 2 L.R. 631. There was a passenger which was seated in a car, on the ground that the women part can be taken to the accident, when want of care, as had he looked at which he did not, he could have seen what was coming. But both Milles & Theobald Smith & J. said that there were many cases where circumstances of exceptional danger required additional precautions beyond those imposed by statute.

Bilbe v London & Brighton R.R. Co. 18 Q.B. 585. Accident by collision at a level crossing. Held that it was proper left to the jury considering all the circumstances whether or not the Company were guilty of negligence in not providing adequate precautions for it for plaintiff affirmed.

Powell v Hall 5 Q.B. 597 at page 601 (Bramwell J.). said "The plaintiff are protected by the Common Law & it is not to be said that no one can be taken from the Statutes, the Statutes do not make it lawful to damage without paying for the injury."

DANIEL STEWART, sworn.

To MR. ELLIOT:—

Q.—You reside in the city? A.—I do.

Q.—Have for some years? A.—The last two years and a-half.

Q.—You remember the 2nd of October last? A.—I do.

Q.—You came in with Mr. Moore from Belmont? A.—Yes, sir.

Q.—Do you recollect what time it was you left Belmont? A.—Between four and five o'clock.

Q.—Did you stop on the way? A.—We did.

Q.—Where did you stop? A.—We stopped at Nilestown and watered the horse.

10 Q.—Anywhere else? A.—Stopped at Mr. Graham's. Mr. Graham sent a message with me to tell his woman, and I got out of the buggy and left the message and went on.

Q.—And you stopped at Homister's? A.—Yes.

Q.—Had you seen Mr. Graham before? A.—I saw him at Belmont.

Q.—Then you came towards the city? A.—Yes, sir.

Q.—You turned off the Hamilton Road on to Maitland street? A.—Yes, sir.

Q.—What did you see there; did you hear anything? A.—I heard some cars up a piece, but there was a row of cars in behind the watchman's shanty, and another shanty stood up a piece from there. There was a row of cars in there, and this train was coming along side of that, and we could not see any more till we got opposite the watchman's shanty.

20 Q.—On the east side to the right is the watchman's shanty? A.—Yes, sir.

Q.—Right hand side? A.—Yes.

Q.—Did you see some cars on the track east of that? A.—Right between the two shanties there is a row of cars there.

Q.—Where is the other shanty? A.—Four or five rods from the watchman's shanty.

Q.—Further east? A.—Yes.

Q.—Between these two there were some freight cars? A.—Yes.

Q.—Were they stationary? A.—I think they were as far as I could see that night.

Q.—These cars that came out and afterwards ran over you, were they north of these cars? A.—Yes.

30 Q.—Then did these stationary cars obstruct the view? A.—Undoubtedly they did.

Q.—Obstructed the view of cars coming on the main track? A.—Yes; I could not see any until we came right opposite the watchman's shanty.

Q.—Did the car come out on the street then from behind the watchman's shanty? A.—Yes, that is the first I seen.

Q.—Had you been keeping a watch out? A.—I generally do crossing the track, but it was after night.

Q.—Now, an effort has been made here to say you and Mr. Moore were drunk, what do you say to that? A.—It is undoubtedly false.

Q.—You say that in regard to yourself? A.—I do.

40 Q.—What do you say in regard to Mr. Moore? A.—I do not think he was drunk at all, nor yet the worse of liquor.

Q.—The first intimation was this car coming from behind the watchman's shanty on to the road? A.—Yes, sir.

Seabright independent of statute

McLennan J. cites this observation with apparent approval
in *McLennan v. Canada* 6. 22 *W.C. Com P* 345

Ham v. GTR 11 *W.C. Com P* 86 negligence at a railway
crossing - Draper C.J. said in relation to
the requirements about sounding the bell or
whistle "I do not understand these provisions
to mean that if the company have on their
locomotives a bell or a whistle or ring the one
or sound the other they are consequently freed
from responsibility for damages that may be
occasioned by the use of their locomotives
upon the Railway, but rather to make it imperative
that these precautions shall be adopted & that
the absence of them shall entitle any person
suffering damage from the neglect or omission
to recover compensation. This may be many
other acts of negligence which will entitle a
sufferer to compensation though the requirements
are exactly fulfilled."

These cases show that independent of the Bell
or whistle many other circumstances have
to be considered ^{as common law} that the R.R. is a common carrier
like any one else, for negligence even though
the statutory requirements are fulfilled.

But I submit in this case that the statutory provisions
have not been complied with
as to *Portman* *vidence of Worth* page 34
Johnson at page 30 & 31

Q.—Can you give us any idea of how far you were from this car? A.—I think we must be ten or fifteen or sixteen feet.

Q.—From the track on which the car was? A.—No; when I first saw the car we must be ten or fifteen, or maybe two rods from it.

Q.—That is to say the car was both in front and to your right? A.—Yes; it was backing up from the east.

Q.—At that time it had not immediately got in front of you? A.—No.

Q.—It was also at one side? A.—Yes, one side of us.

Q.—Did you observe what the horse did, how he behaved? A.—He behaved all right enough; it got a little frightened and he made a jump.

Q.—Did he make a jump forward? A.—Yes, sir.

Q.—And the horse got past? A.—Yes.

Q.—And the conveyance, what became of it? A.—I could not tell you.

Q.—At that time what became of it? A.—I did not know any more after the car struck the conveyance; I was sent about 15 feet on the north side of the track.

Q.—Did you see anything of Moore? A.—Not at that time. Some man came there and asked me if I was hurt, and he picked me up, and after he picked me up I began to come to my senses.

Q.—Were you not insensible? A.—Yes, I laid there quite awhile.

Q.—You were injured I believe? A.—Yes, sir.

20 Q.—Where were you injured? A.—I was cut over the eye.

Q.—You have not brought any action against the Grand Trunk? A.—No, sir.

Q.—Was that because it was alleged you were under the influence of liquor? A.—No, sir.

MR. MEREDITH objects.

Q.—When you came to what took place? A.—There was some gentleman with a light; I asked him if there was any place around I could wash my face, and he said yes; he took me over to a shanty like and I went in and washed my face and then I went home.

Q.—Did you see the horse that evening? A.—Yes, there was some person led the horse back.

Q.—How was Moore driving that evening? A.—He did not drive very fast.

Q.—It is said you were driving very rapidly across these tracks, is that true? A.—No.

30 Q.—Was he driving moderately? A.—That is all.

Q.—Was it a good horse? A.—A good, fair horse, drive along about five miles an hour, or maybe a little better.

Q.—Did this cover of the buggy obstruct the view at all? A.—No, I should not think it did.

Q.—Mr. Moore tells us it was half up? A.—It was about half up, if I remember right.

Q.—The sides did not obstruct the view? A.—Not at all.

Q.—You saw no man and had no intimation until you saw this train? A.—No.

Q.—Do you know how many cars were being backed up? A.—I could not say.

Q.—The engine was at the east end? A.—Yes.

Q.—You heard no bell? A.—I could not swear to that.

40 Q.—What sort of a buggy was this? A.—Good, fair buggy.

Q.—Did you see it after the accident? A.—I did one day, but I paid no attention to it much.

Q.—You did not see it that night? A.—No, I did not.

Q.—You were too badly hurt? A.—No, I did not pay much attention that night.

Q.—It was pretty badly wrecked? A.—Yes, it was pretty badly wrecked.

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Q.—It could not be repaired? A.—It could be repaired, but it would cost as much as it was worth.

THE COURT—I do not understand how the buggy comes to form any portion of the damage in this case.

MR. ELLIOT—Why?

THE COURT—You have got to show that there is some claim on the part of your client to the owner of the buggy.

MR. ELLIOT—Suppose this Railway Company are guilty of negligence, surely the liveryman would have an action?

10 THE COURT—He might have an action against the Company, but would he have an action against Mr. Moore?

MR. ELLIOT—I grant you that.

THE COURT—That being the case, how would Mr. Moore have an action? Suppose he had given a release to Mr. Moore, would Mr. Moore have a right to sue the Company?

MR. ELLIOT—Mr. Moore, as a bailee, has a right to bring the action.

CROSS-EXAMINED BY MR. R. M. MEREDITH:—

Q.—I understand that coming up this street there is first the old Grand Trunk track, you had crossed that? A.—Yes.

20 Q.—Was there any track between that and the track upon which the accident happened? A.—I could not say.

Q.—That was some distance back, 100 yards or more? A.—I could not say how far it was.

Q.—What you were coming to was the new line of the Grand Trunk Company? A.—Yes, I suppose it was.

Q.—Just a single track or double track? A.—Quite a number of tracks.

Q.—Would you like to say there are any more than a pair of tracks there? A.—I am told there is.

Q.—I am told there was just two tracks? A.—It might be; I would not say.

Q.—At all events it was on the main line of the railway? A.—I suppose it was on the main line; I could not see that night.

30 Q.—You know now? A.—I have heard it was.

Q.—Have you been to look at it? A.—I have passed there since.

Q.—It was the most northerly track crossing that street? A.—Yes, sir.

Q.—A good deal of traffic there? A.—I suppose there is a lot of traffic there.

Q.—All the through business of the Grand Trunk goes over that? A.—Yes.

Q.—It does not go over the other tracks which you had passed over? A.—Not so much.

Q.—That is the old Grand Trunk which was given up, and all the trains now come into the main track into the main station? A.—Yes.

Q.—So what you had passed over were practically disused tracks? A.—I do not think they are used as much.

40 Q.—You know they have closed the old Grand Trunk station? A.—I was not aware of that.

Q.—The train was coming from the east? A.—Yes, sir.

Q.—You heard the rumbling of it how long before? A.—I think I heard the train come; heard some noise as we were coming across after we got across the first track.

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Q.—You think you heard the rumbling of that train? A.—Yes, up a little ways.

Q.—Did you hear that continuously until you came to the place where the accident happened?
A.—No, I could not say I did.

Q.—Even when you were as far away back as the old Grand Trunk line you heard the rumbling of the train coming? A.—I think we were across the track.

Q.—Coming up to the track when you heard this train coming? A.—Yes.

Q.—Did you say anything to Moore about you heard the train coming? A.—I told him he had better hurry up and get across before the train came for fear it might be closer by than we were aware of.

10 Q.—Then he did drive up, I suppose, faster? A.—I could not say. I guess he hurried the horse up a little.

Q.—He says he presumes you were going at a trot? A.—Yes, we were trotting.

Q.—There was nothing that night, he says, to prevent you hearing the cars moving? A.—It was a kind of a quiet night. I do not think there was much noise.

Q.—He says you were in conversation he thinks at the time. Do you remember what you were talking about? A.—I could not say, I am sure.

Q.—Which side were you on? A.—On the left hand side.

Q.—That would be further from the train? A.—Yes, sir.

Q.—He would have the best chance to see it? A.—Yes, sir.

20 Q.—There was no buildings there? A.—Only a little shanty. There was another shanty up a little piece from that.

Q.—Only small buildings? A.—Not very large.

Q.—The track is all exposed to that road except these two little shanties? A.—Yes, sir, but the row of box cars behind these shanties would take the sight from us.

Q.—It is quite level there and if there is nothing else in the way it would be quite easy to see that moving train? A.—I think it would.

Q.—The cars that you saw on that occasion, that you thought obstructed the view, were not they the moving cars? A.—I could not say whether they were or not.

Q.—Then it might have been the moving cars that obstructed the view? A.—No; the moving
30 cars were on the other side of them.

Q.—They say it was the moving cars; they were mistaken for the stationary cars? A.—I do not think they were.

Q.—You would not undertake to swear they were not moving? A.—As far as I know I am satisfied they were not moving.

Q.—How many do you think there were of that kind? A.—I could not tell you; I think there was three or four anyway.

Q.—Of course they would not obstruct much of the view? A.—They just obstructed the view between the two shanties.

Q.—The whole of the way between the two shanties? A.—I would not say.

40 Q.—They would not obstruct the view of a train 16 cars in length? A.—No; it does not stand to reason it should.

Q.—Here is what Mr. Moore says in regard to that, "the train was coming from what direction?
A.—From the east. They were backing up 16 cars I am told. I did not count the cars." Q.—Would you agree with that, that they were backing up 16 cars? A.—I did not count the cars; I did not feel like counting them.

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Q.—I understand you to say the bell was ringing? A.—I think I heard the bell, but I thought it was away at the east end; I thought I heard the bell ringing there.

Q.—Then it would seem to have been a pure accident? Can you suggest where the Company was to blame at all? A.—The way they were to blame, if their watchman was there and on duty we would not have driven on.

Q.—That is the only fault you can find with them, that the watchman was not on duty there? A.—That is the only fault I can find.

Q.—If they were not bound to have a watchman there, there was no fault you could find? A.—It was our own look out then, there would be no dependence on a watchman.

10 Q.—After hearing the train and hearing the bell ringing, you did hear the train some two rods away? A.—Did not see the train till we got to the watchman's shanty.

Q.—It was two rods away from you? A.—It depends upon how far the shanty is away.

Q.—That is the trouble we are in; we do not know how far the shanty is away? A.—I do not think the shanty is more than two rods.

Q.—Would two rods be about right; just measure it with your eye? A.—I do not think it would be any further than two rods, if it is two rods.

Q.—I suppose Moore saw it as soon as you did? A.—He had as good a chance as I had to see it a little better.

Q.—If he did not see it, it was his own fault? Could you tell me why he did not pull up then?

20 A.—We were too far on the track to pull up. I thought our safest plan would be to get over as fast as we could. We were too far gone.

Q.—Do you mean to say your horse's head was on the track at that time? A.—I think he was the time I saw the train first.

Q.—It was leaving Belmont I suppose you had not been in company with Gilmore? A.—I saw him on the show ground.

Q.—He had something to drink there? A.—I could not say.

Q.—He had been drinking; I suppose you knew that from his breath? A.—I could not tell whether he was.

Q.—The first tavern you came to was Nilestown? A.—Yes, sir.

30 Q.—He had a drink there? A.—Not that I saw.

Q.—Graham's was the next tavern you came to. Do you know whether he drank there? A.—I could not say.

Q.—He went in, did he? A.—I think he did.

Q.—You remained in the buggy? A.—I went in and delivered my message and came out to the buggy, and if I mind right he was watering the horse, and whether he went in after that I cannot say.

Q.—Was Homister's the only other tavern he stopped at? A.—Yes.

Q.—What did he stop there for? A.—I cannot tell you.

Q.—There he had two glasses of whiskey? A.—I do not know what he took.

Q.—He stopped so near home as that, how long? A.—Ten or fifteen minutes.

40 To MR. ELLIOT :—

Q.—I suppose if Moore had been so drunk as my learned friend tried to make out you would not have allowed him to drive across the railway track? A.—No, I do not think I would.

Q.—Was there anything in his driving to indicate he was under the influence of liquor? A.—No

Q.—You have told my learned friend you heard a bell ringing? A.—Away at the east end.

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the east end.

Q.—Now, there is a great deal of traffic in that part of the town? A.—I suppose there is.

Q.—Do you know whether that bell you heard was the bell of this engine? A.—I do not know.

Q.—I suppose you could stand on some of these corners and hear a dozen bells ring? A.—Yes.

Q.—Did you know when you heard the bell ringing the train was approaching? A.—I did not.

Q.—My learned friend has got you to state that the only way in which this Company was negligent was because there was no watchman there? A.—There was no watchman there that I saw.

Q.—Did you think it was negligence to have the cars intercepting the view?

MR. MEREDITH objects.

Q.—You say when you observed these cars you were two rods away? A.—I think it would be
10 two rods.

Q.—You said it was a distance from where you were to the watchman's shanty? A.—Yes, that would be to the right.

Q.—Then it was the distance from the watchman's shanty from where you were to the right? A.—Yes, the car might be a little past the watchman's shanty.

Q.—How near were you to the track on which the car was when you first saw it? A.—If I remember right the horse was right over the first rail of that track, in the centre of the track.

Q.—And the car was just at the side of the street? A.—Yes.

Q.—Did you observe anybody taking the horse by the head? A.—No, sir.

Q.—Do you think that is so? A.—Well, I do not mind of anybody doing it.

20 Q.—Did you hear that any such thing occurred? A.—No.

Q.—It is said here that some of the railroad men seized the horse by the head? A.—I do not mind it.

Q.—You would remember if that had occurred? A.—Well, I think so.

WILLIAM THOMPSON, called by the plaintiff, and sworn.

To MR. ELLIOT:—

Q.—You are a carriagemaker in town? A.—Yes, sir.

Q.—Have been for a number of years, I believe? Did you see this conveyance that met with this accident? A.—I do not know. I did not see the accident; I seen the buggy that was brought into the yard.

30 Q.—What sort of shape was it in? A.—Pretty well broken up.

Q.—Was it past repairing? A.—It was not worth repairing hardly. I told them at the time.

Q.—In consequence of its injuries? A.—The way it was broken up.

Q.—Could you tell, from what you saw, what sort of a buggy it had been? A.—The quality of it?

Q.—The value of it? A.—It looked to me a buggy worth somewhere from \$40 to \$50.

Q.—It was past repairing? A.—Yes, it was not worth repairing.

CROSS-EXAMINED BY MR. E. MEREDITH:—

Q.—The buggy, you say would be worth if new from \$40 to \$50? A.—Somewhere about that.

Q.—Had the buggy been run? A.—Yes; I could not say how long.

Q.—It would cost from \$20 to \$30 to put it in order? A.—That is without a top; a top would
40 cost \$15.

Q.—The buggy was worth from \$40 to \$50? A.—Yes.

Case closed.

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MOTION FOR NON-SUIT.

MR. R. M. MEREDITH—We claim that there is no pretence of a case made out. The plaintiff coming into Court must show some reason why he should recover. He must show clearly beyond any doubt a breach of some duty and some wrongful act on the part of the defendant. Now, I ask my learned friend to point, if he can, any breach of duty that is imposed on the railway, or any wrong done by them in this matter. The case, as the last witness puts it, is purely a case of an accident. The railway had a right to have their railway tracks there; they had a right to use the railroad as they were using it that day; the right to cross the road as often as their business required it, and unless my learned friend can show that on crossing that road they are guilty of some wrong, he cannot recover in an action

10 of this sort. It was, a short time ago, common for people to bring actions against railway companies and recover damages simply because they were railway companies, but now the Court insists upon the plaintiff placing his finger on some wrongful act on the part of the railway before they will allow the case to go before a jury. It was the plaintiff's duty not to run into the railway train, as we are all aware railway trains cannot be managed the same as a horse and buggy. When a person approaches a railway track he is bound to do it with the greatest care, and it seems to me this was a case of Mr. Moore running into the railway train instead of the railway train running into him. What negligence, what duty, has been asserted that the defendant's have broken in any way? The only thing that can be suggested is that they did not have a watchman. I need not cite to Your Honor that the law does not require them to have a watchman. If there were a statute requiring them to have a watchman

20 there, then if my learned friend proved they had not a watchman there, then he might succeed. Railways are a necessity for the country. It is absolutely necessary for these lines to be operated and that they should be operated with as much speed and regularity as possible. It is the duty of a person approaching a railway train to avoid any danger. What was done in this case, from first to last, was not done to avoid danger. The train was moving apparently, the bell was ringing. Why, on earth, did not this man pull up? If they had done that they would have avoided the accident and nothing would have happened. The cases upon the point are so clear I would ask Your Honor to determine no case has been made out. The onus of showing negligence is upon the plaintiff. I refer Your Honor, as to the law bearing very much upon this case, to the most recent case of Jones against the Grand Trunk Railway, and the Davey case. The second point I make to Your Honor is this, that the accident

30 clearly occurred as stated in the Davey case, through the want of care of the man that was driving. Driving fast, driving right into danger. If he had stopped a moment, what anybody of sense would have done, expecting a watchman there, and seeing no watchman not to go on, but to wait till he would see if the way was clear. Stewart says he heard the rumbling of the train and drove faster instead of stopping in a place of safety until the danger was over. He himself said he looked straight north and in no other way.

THE COURT—He could not see very well any other way, because there was the obstruction in the road to prevent them.

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MR. MEREDITH—There were these cars that the witness Stewart won't swear were not moving train, and they were only three cars in length, while the other cars were sixteen in length. It seems to me to be a clear case of going right on to danger without taking the ordinary precautions that anybody would take. He puts it himself, there was no watchman there, and that is the reason he claims he had a right to go on. I saw there was no watchman there. I thought there were no cars because there was no watchman, and so went on. If a railway company are to be liable simply because there is an accident, it would be a very hard thing upon the railway companies. There must be a negligence alleged and negligence proved. I submit there is not one tittle of negligence proved here, and the cases I have cited are expressly in point, and the plaintiff ought therefore to be non-suited.

10 THE COURT—The distinction I see between that case and the present case is that there was a watchman's shanty on the road. If there had been no watchman's shanty there it would be a question. But having once built that shanty and having a watchman there, it was the duty of the Company to keep a watchman there. It might not have been necessary to have put that shanty there, but having put it there, and having put a watchman there, the public felt they were safe in passing by reason of there being a watchman there.

MR. MEREDITH—Of course if you Honor holds the building of the shanty there renders it necessary to keep a watchman there at all hours of the day and night, then we have a breach of duty. They might want a watchman there only on Saturday.

THE COURT—That is the weak point in the plaintiff's case in not going further and showing
20 whether a watchman is usually there or not.

MR. MEREDITH—This case I have cited, there was a watchman there and he was talking to two boys, not doing his duty.

MR. ELLIOT—I admit that this Railway Company are not obliged to have a watchman there, but I submit if they have no watchman they have to provide other means whereby they intimate to passengers the approach of trains. Your Honor is aware that there is a statutory obligation that every engine approaching a railway crossing must, when they get within 80 rods, sound a bell or blow a whistle. Here we have an engine and 16 cars from this crossing and they say a bell was heard in the distance. Mr. Stewart says he heard a bell away east. He did not know a train of 16 cars was coming. I submit that is negligence of the grossest description. The case of Jones against the Grand
30 Trunk, which Your Honor will recollect, has no bearing whatever upon this case. In that case the plaintiff went unnecessarily out of his way. I think he was going to the station, and instead of going along the way provided for that means he went along a track, an unnecessary deviation from the regular path. I submit there is abundance of evidence to show negligence on the part of this Company. That there is this backing down these cars without any man on the crossing. There was no light upon the first car or upon the last car. The engine away up at the end of the sixteen cars. There is nothing to show there was any whistling or bell ringing, except what Mr. Stewart says he heard away in the distance. There is no doubt this signalman's shanty obstructs the view. There is no doubt the cars obstruct the view.

THE COURT—I won't withdraw the case from the jury.

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DEFENCE.

AMOS BLACKWELL, called by the defendant, and sworn.

To MR. MEREDITH :—

Q.—You are a switchman? A.—Yes, sir.

Q.—Where are you situated? A.—I was at Maitland street the night of the accident.

Q.—Is there any watchman kept at that crossing? A.—Not after half-past seven.

Q.—Never is? A.—No, sir.

Q.—Do you remember the night of the accident? A.—Yes, sir.

Q.—What were you doing? A.—I was switching at the time.

10 Q.—Do you recollect this train coming down? A.—Yes, sir.

Q.—Where were you? A.—At Maitland street.

Q.—On the train or near the train? A.—Walking along side the last car.

Q.—For what distance east of the crossing? A.—Just a short distance before the accident occurred.

Q.—About how far? A.—From near the centre of the road.

Q.—What did you observe? A.—I observed the yardsman on the end of the train giving a yell.

Q.—There was a yardsman on the end of the train? A.—Yes, sir.

Q.—How many cars attached to this train? A.—Five.

Q.—What did the yardsman do? A.—He yelled at a coming rig. He saw a rig coming and
20 yelled.

Q.—Did he yell pretty loud? A.—Yes, sir.

Q.—How far could you hear him? A.—You could hear him a good block off.

Q.—Where was the rig at this time? A.—Near to the track.

Q.—How close to the track? A.—About ten feet, I should judge.

Q.—What did the driver of the rig do? A.—The first I noticed was the yardsman jump off the train and catch the horse by the head and yell a second time.

Q.—After yelling the first time he jumped off the train and caught the horse by the head and yelled again? A.—Yes.

Q.—How far would the horse be from the train then? A.—Would not be more than four feet
30 off the track.

Q.—When he took him by the head? A.—Yes.

Q.—What happened then? A.—The driver of the rig urged the horse on and the yardsman jumped away from the horse.

Q.—And the accident happened in that way? A.—Yes, sir.

Q.—Came close to the moving train then? A.—Yes.

Q.—You said he would be about ten feet from the train when he yelled first? A.—About ten feet angle ways.

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Q.—Did you see what happened then? A.—Only as soon as he urged the horse on; the horse gave a pull off from the boards between the passengers' sidewalk and the horse-way.

Q.—Was the bell ringing? A.—Yes, sir.

Q.—You swear positively to that? A.—Yes, sir.

Q.—Were there any cars standing on the track this side? A.—I could not say.

Q.—Did the yardsman have any light? A.—He was on the bottom of the brake-beam hanging on to the ladder.

Q.—Lumber there? A.—Yes, sir.

Q.—At what rate of speed were they going down? A.—Between two and three miles an hour
10 not any faster than three miles an hour.

Q.—Are you working for the Grand Trunk now? A.—No, sir.

Q.—Where are you working now? A.—In Wortman and Ward's Foundry.

Q.—Anything to prevent any person seeing up the track? A.—Not that I was aware of; only the
+ watchman's shanty.

Q.—That is just a small building? A.—Yes, sir.

Q.—Would the rumbling of the train make any noise? A.—Yes, sir.

Q.—Could be heard a considerable distance? A.—Quite a ways.

Q.—The bell ringing could be heard a considerable distance? A.—Yes, sir.

Q.—Can be heard a block away? A.—If a person is listening.

20 CROSS-EXAMINED BY MR. ELLIOT:—

Q.—A good deal of traffic in that part of the town? A.—Yes, sir.

Q.—Trains passing and re-passing all the time? A.—Yes.

Q.—That is the shunting ground of the Grand Trunk? A.—It is in that neighborhood.

Q.—Bells going? A.—Whenever there are any engines around.

Q.—There are engines around nearly all the time. Is it not a matter of fact that a great deal of
+ shunting is done at night time? A.—Yes, sir.

Q.—You say this watchman's house obstructed the view? A.—Yes.

Q.—If there had been any stationary cars there it would have obstructed the view? A.—Yes.

Q.—You have told us you did not know whether there were cars there or not? A.—I could not
30 say.

Q.—Where did you tell my learned friend you were at the time of the accident? A.—Walking along the side of the cars.

Q.—Would that be on the north side? A.—No, the south side of the cars.

Q.—How far from Maitland street? A.—About six feet I should judge from the shanty.

Q.—When the accident occurred? A.—No, before the accident occurred.

Q.—Before the accident occurred you were six or eight feet from the shanty? A.—Yes, sir.

Q.—Had you seen this carriage approaching? A.—Not until I heard the yardsman yell.

Q.—Is that the yardsman that was on the end of the train? A.—Yes.

Q.—What you call the brake-beam? A.—Yes, sir.

Q.—Was he standing on that? A.—Yes, sir.
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Q.—Where was he at the time? A.—He was hanging on the ladder with his feet on the brake-beam.

Q.—You were six or eight feet from the shanty? A.—Yes.

Q.—The shanty is right on the side of the road? A.—Yes, sir.

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- Q.—Where was the car? A.—The end of the car was past the shanty.
 Q.—They were on Maitland street? A.—Yes, sir.
 Q.—It was then that he yelled? A.—Yes, sir.
 Q.—Did you see him jump off? A.—I did.
 Q.—Did he yell before he jumped? A.—Yes.
 Q.—Which way did he go? A.—He jumped off the end of the car and got hold of the horse's head.
 Q.—Did he run straight on the track? A.—No, jumped to the side of the car and on to the roadway.
 10 Q.—Then he seized the horse by the head? A.—Yes.
 Q.—Did he arrest the progress of the horse? A.—He got hold of it and hallooed, and then when the man urged the horse on he jumped away.
 ✓ Q.—How near was the horse to the track at the time? A.—Four or five feet.
 ✓ Q.—When he first seized hold of it? A.—Yes.
 ✓ Q.—You had not seen the horse before? A.—No.
 Q.—You could not say what rate they were going? A.—No.
 Q.—You say the horse was urged on? A.—Yes.
 Q.—Was it struck by the whip? A.—I could not say.
 ✓ 20 Q.—Do you know whether it was urged on or whether it was frightened by the appearance of the car? A.—I think it was more from the yardsman getting hold of his head.
 Q.—When this yardsman stands upon the brake-beam would that bring his head above the top of the car? A.—No.
 Q.—He could not give much of a signal from there. Had he a lantern in his hand? A.—Yes.
 Q.—He could not give a signal as he could from the top of the car for passengers going across Maitland street? A.—I suppose he could give a better signal.
 Q.—Supposing there were cars obstructing his view? A.—I don't suppose he could any more than he could on the top of the car.
 Q.—Until this plaintiff and this carriage came on to the line of the track where these cars were he could not see this brakeman at all? A.—I should judge that he could.
 ✓ 30 Q.—You just told us the shanty intercepted the view, and if there were cars there they intercepted the view? A.—Yes, if there were cars.
 Q.—Supposing there were cars there? A.—It would for a ways, but as near as they were they could see the lantern.
 ✓ 1 Q.—They could not see the lantern until the car was out into the street? A.—No.
 Q.—It is said there were seventeen cars on this train at this time? A.—No, sir, there was only five.
 Q.—What were they, box cars? A.—Box cars.
 Q.—What rate were you going? A.—Between two and three miles an hour.
 Q.—What were you doing, shunting? A.—No, backing up the cars to put on to the train.
 40 Q.—The other part of the train was behind? A.—Yes, sir.
 Q.—How many cars at that end? A.—I could not say.
 RE-EXAMINED BY MR. E. MEREDITH:—
 Q.—The track upon which the accident happened, there were no cars upon that? A.—No, sir.
 Q.—The track to the south of that, how far would that be from the main track? A.—From here to the end of that side there.

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A.—No, sir.

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Q.—If there were cars on the other track where would they be? A.—To the east of the crossing.

Q.—Any person driving to the centre of that track would have ample view all up that track?

A.—Yes, sir.

✓ Q.—This man standing on the brake-beam would be in a better position than on the top of the car? A.—If he was on the top of the car they could see him a great deal further.

Q.—It is part of his duty to be upon the brake-beam? A.—Yes.

THE COURT—There was a train there stationary? A.—I don't know about that.

RE-EXAMINED BY MR. ELLIOT:—

Q.—What does this yardsman stand on the end for, to signal danger? A.—Yes, sir.

10 THOMAS ISHERWOOD, sworn.

To MR. MEREDITH:—

Q.—I believe you are a driver? A.—Yes, sir.

Q.—How long have you been in the service of the Grand Trunk? A.—Fifteen years.

Q.—Do you remember the accident of the 2nd of October? A.—Yes.

Q.—Were you in charge of the engine? A.—Yes, sir.

Q.—What were you doing? A.—Backing down what is called Walker's Main Line.

Q.—Is that the track the accident happened on? A.—Yes.

Q.—How far east of Maitland street had you commenced to back down? A.—Forty yards.

Q.—From the time you started to back down was the bell ringing? A.—Yes, sir.

20 Q.—The whistle sounding? A.—I did not sound the whistle.

Q.—Could the bell be heard some distance? A.—Yes, sir; almost two blocks.

Q.—That was continually sounded from the time you commenced until you got off the crossing?

A.—Yes.

Q.—Did you hear anything? A.—I heard the watchman let a yell out of him.

Q.—What did you do then? A.—I reversed the engine and stopped as quick as I could.

Q.—Of course you could not see from the position you were in? A.—I could not see anything; it was a very dark night.

Q.—How far is the other track from the track you were backing down on? A.—It would be as far as from here to that wall.

30 Q.—Do you know anything about any cars standing on that track? A.—I did not notice any cars there.

Q.—How far is the watchman's shanty from that crossing? A.—Pretty near close to the crossing; there is only one sidewalk on that crossing and that is the west side.

Q.—How far would that be from the wagon road crossing to the watchman's shanty? A.—Thirty feet.

Q.—How far from the line? A.—About 8 feet.

Q.—Is there a clear view there? A.—There is a view between the watchman's shanty and the tool shanty that belongs to the track men, about 40 or 50 feet.

Q.—Clear view? A.—Clear view right from the south side of the track; you can see between 40 these two shanties.

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Q.—Any person could see an approaching train? A.—Unless there is cars standing there.

Q.—You did not see any cars standing there? A.—No.

Q.—Was there anything in the world to prevent any person driving across there to hear the bell ringing? A.—Not at all; there was not any trains around there or engines around there for over a half-hour.

Q.—At what rate were you backing down? A.—It might be two miles or a little more.

Q.—The bell was continually ringing from the time you started until you got to the crossing? A.—Yes.

TO THE COURT.

10 Q.—Had the yardsman a lantern in his hand? A.—Yes, when he gave me a signal to stop over the switch, and he gave me signal to back up, and he went behind the cars and I did not see him any more till I heard the yell, and I stopped as quick as I could

Q.—What about this watchman? A.—He is not supposed to be on duty after 7.30.

Q.—Is there much shunting going on there after 7.30? A.—Sometimes there is.

Q.—Isn't the danger as great after 7.30 as before? A.—There is not so many trains through the night as through the day.

Q.—There are some? A.—There are some; he stays on there until No. 13 comes in and a half hour after that comes in. It comes in at 6.30 and then it comes back the next morning.

CROSS-EXAMINED BY MR. ELLIOT.

20 Q.—When you say there were not so many trains in the night time, do you mean these ordinary passenger trains and freight trains? A.—Yes.

Q.—As a fact is there not more shunting done in the night time than in the day time? A.—No.

Q.—What shunting is done is done in that neighborhood? A.—Most of the shunting is done around that neighborhood at that end of the yard.

Q.—It is quite a busy portion of the yard? A.—It is.

Q.—How many tracks are there across there? A.—There are three; the north track, the central track going west, and the south track going east; that is all there is there, but if you want to go on to the Grand Trunk it is done away with.

Q.—It is the same crossing? A.—Yes.

30 Q.—There are tracks there? A.—Yes.

Q.—Are they never used? A.—Only for shunting; there is no shunting at night time there.

Q.—Do not cars stand there on these tracks? A.—Yes.

Q.—Do you know that night whether there were cars on that next track or not? A.—I do not.

Q.—Then you speak about the space around the signal house giving you a view of about 40 or 50 feet. If there are cars there the view is intercepted? A.—Yes.

Q.—Then if there are cars there you cannot see up the track till you get upon it? A.—Till you get behind the shanty.

Q.—How far is the shanty from the track you were on? A.—Eight feet.

Q.—So if there are cars there you have to come within eight feet of the track before you can see 40 eastward? A.—No, you have not; when you cross over the Grand Trunk siding and get on the north side of the track you can see behind the shanty.

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Q.—But if there are cars on this side track south of the shanty then you cannot see eastward ?
A.—If you are south of these cars you cannot see, but if you are north of these cars you can see.

Q.—But when you are north of them you are quite close to the main track ? A.—You are 40 feet away.

Q.—You say you can see them whether there are cars or not ? A.—Yes.

Q.—Coming from the south, approaching the city, suppose there are box cars standing on the side tracks around by Maitland street can you see the main line up eastward ? A.—Not till you get north of these tracks.

Q.—You were going very slowly ? A.—Yes.

10 Q.—Was it one of these small engines ? A.—Yes, pony engine.

Q.—How many cars did you say you had ? A.—Five.

Q.—You heard the brakeman yell ? A.—Yes.

Q.—Can you tell us how near the rear car or the front car would be to the crossing of Maitland street when you heard this yell ? A.—I could not tell you because it was dark ; I could not see the end of the car.

Q.—You reversed the engine ? A.—Yes.

Q.—How far did you run before the train stopped ? A.—Between 40 and 50 feet.

Q.—If you were going so slowly and only had five cars could not you have stopped within a shorter distance than that ? A.—No.

20 Q.—Was the first car past Maitland street when you did stop ? A.—The first car was across Maitland street over the sidewalk and the second car stood on the centre of the street.

Q.—Then you went at least a car and a half ? A.—Yes.

Q.—There was somebody in the engine with you ? A.—The fireman.

Q.—Anybody else ? A.—Nobody else.

Q.—Is not there a man named Turten, a yardsman ? A.—Yes.

Q.—Was not he on the engine at the time ? A.—No, sir.

Q.—This is a report made by your own Company, here it is stated that he was ? A.—He has what you call charge of the engine, we have to obey his orders and go where he tells us.

Q.—What are the duties of the yardsman ? A.—Make up trains and shunting all trains that 30 come in on their beat.

Q.—What was Worth on the end of that car for—on the end of the brake-beam ? A.—We always have someone on the back of the car backing down over a crossing.

Q.—What would he be there for ? A.—To give a signal if one was wanted.

Q.—Signal to the engine-driver ? A.—Yes, or signal to anyone else to keep out of the way.

Q.—As soon as you heard the yelling did you see the lantern wave ? A.—No, sir, I did not.

Q.—What did you reverse your engine for ? A.—On account of hearing the yell.

RE-EXAMINED BY MR. E. MEREDITH :—

Q.—Between the main track, where the accident happened and this other track, there is no obstruction ? A.—No obstruction but these two shanties unless there are cars standing upon that track,

✓ 40 but I did not notice any cars standing there.

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MICHAEL DURKIN, called by the defendant, and sworn.

To Mr. E. MEREDITH:—

Q.—You are the fireman? A.—Yes, sir.

Q.—You were in the engine with the last witness? A.—Yes, sir.

Q.—Did you hear this shout? A.—I heard a little of it; not much. You do not hear so much on the engine.

Q.—Did you know the engine was reversed? A.—Yes, my mate stopped the engine.

Q.—What were you doing? A.—Ringing the bell.

Q.—Did the bell ring continuously? A.—Yes, sir, I always ring it at the crossing.

10 Q.—It was ringing this night? A.—Yes, sir.

Q.—How far could it be heard? A.—Two blocks; five blocks sometimes.

Q.—Any other engine around there at the time? A.—No.

Q.—From where you were could you see anything of the accident at all? A.—No, all I seen was the horse. I seen the horse after my mate stopped.

Q.—That was after the accident happened? A.—Yes.

CROSS-EXAMINED BY MR. ELLIOT.

Q.—How far up the line eastward had you been with your train? A.—We crossed three tracks altogether so as to switch to come down the other track.

Q.—Did you come from the west of Maitland street originally? A.—Yes, sir.

20 Q.—The other end of the train was west of Maitland street? A.—Yes.

Q.—Then you went up east to Maitland street? A.—Yes, cut across three tracks.

Q.—When you were going eastward how far east did you go? A.—Just five car lengths, might go a little more.

Q.—How far east of Maitland street is that switch? A.—About 40 feet.

Q.—You had been that far eastward and then you were backing up? A.—Yes.

Q.—That switch is 40 feet east of Maitland street? A.—Yes.

Q.—Of that switchman's house? A.—Yes.

Q.—There is a good deal of shunting done as a rule there? A.—All night.

Q.—More shunting done in that neighborhood than anywhere else? A.—More done around the 30 station.

Q.—Freight business is done up there? A.—Yes.

Q.—It was a pretty dark night? A.—I seen the white horse.

Q.—Is there a light there at all? A.—What the city gives.

Q.—You saw a grey horse? A.—Yes.

Q.—Was that after the accident? A.—Yes.

Q.—Did you hear this yelling? A.—I heard a confusion and I said to my mate there was something the matter and I went back to the crossing.

Q.—Did you hear anything before the accident? A.—Not till my mate stopped; there was some noise when my mate reversed the engine.

40 Q.—When your mate reversed the engine had not the accident happened? A.—Yes.

Q.—If your mate reversed the engine the moment he heard the yell that was after the accident? A.—It must be after, it could not be before.

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Q.—Then the yelling was done after the accident? A.—How could it be?

Q.—Your mate says the moment he heard the yelling he reversed the engine? A.—Yes.

Q.—You say when that was done the accident had already occurred? A.—Not at all; it is nonsense.

Q.—Did not you tell us that just now? A.—No.

Q.—What did you tell us? A.—I am not talking backwards.

Q.—You said when the engine was reversed the accident had occurred? A.—The accident took place there, and here is the horse away off this way.

Q.—Had the accident occurred then? A.—Why, certainly.

10 Q.—When did you first know there was an accident? A.—Not till we stopped and went back to it.

Q.—You were not going very fast? A.—No.

Q.—It would not take very long to stop the five cars? A.—Not when we stopped from the center of the street to the sidewalk.

Q.—Your mate said you went the length of a car and a-half before you stopped? A.—Yes, the men were on the sidewalk.

Q.—When the engine was reversed I understand you to say the accident had occurred; you saw there was something up? A.—Yes; I saw there was something up because I seen a horse going by.

Q.—Which side of the track was the horse on then? A.—The north side.

20 Q.—Had the carriage behind him? A.—No.

Q.—Then the accident had occurred? A.—Certainly.

Q.—When the engine was reversed you say you looked out and saw the horse? A.—Yes.

Q.—Then the accident had occurred? A.—Yes.

RE-EXAMINED BY MR. MEREDITH:—

Q.—It would take some time to reverse the engine? A.—About a second; it is done as quick as a thought.

Q.—At all events, when you looked out you saw the horse going away? A.—Yes.

Q.—How far east of Maitland street did you go before you turned to come back? A.—Clear of the switch.

30 Q.—Forty rods the last witness said? A.—You can reckon the length of five cars. We just cleared the switch to clear the rail and then backed up.

JOHN T. WORTH, called by the defendant, and sworn.

To MR. E. MEREDITH:—

Q.—You are a yardsman? A.—Yes, sir.

Q.—How long have you been in the Company's service? A.—About two years.

Q.—You were engaged in this part of the yard that night? A.—Yes.

Q.—Well acquainted with the whole yard? A.—I am, sir.

Q.—Do you remember the night of the accident? A.—I do.

Q.—What were you doing? A.—Riding on the brake-beam of this car.

40 Q.—The brake-beam is what? A.—It is part of the gearing.

Railway Act Chap 109 sec 52

Sec 52 When ever any train of cars is moving reversed in any at-Town or village the locomotive being in the rear the Company shall station on the last car in the train a person who shall warn persons standing on or crossing the track of such railway of the approach of such train, and for every violation of the provisions of this section or of any of the three sections next preceding the company shall incur a penalty of One hundred dollars

Sec 25 sub Sec 7 the bell shall be rung or the whistle sounded at the distance of at least 80 rods from every place at which the railway crosses any highway and be kept ringing or be sounded at short intervals until the engine has crossed such highway, and the company shall for each neglect to comply with the provisions of this section incur a penalty of \$8 and shall also be liable for all damages sustained by any person by reason of such neglect

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Q.—You were riding upon this with your lantern in your hand? A.—Yes.

Q.—How far had the train gone east of Maitland street? A.—About 45 yards.

Q.—You were coming back? A.—Backing up on Walker's Siding.

Q.—You were standing with your light upon the end of this last car? A.—Yes.

Q.—That was your duty? A.—Yes, sir.

Q.—What did you see? A.—I did not see anything but the white horse.

Q.—Where were you when you first saw the white horse? A.—Standing on the brake-beam.

Q.—Were you on Maitland street? A.—No, I was about 15 feet from the crossing diagonally.

Q.—How far was the white horse from the track? A.—Not more than 15 or 16 feet.

Q.—What did you do? A.—Jumped up and gave a yell and grabbed at the horse by the head.

I gathered some part of the harness. I do not know what it was.

Q.—Did you stop him? A.—No, I did not.

Q.—Why? A.—Because I could not do it, they were forcing him on.

Q.—You tried to stop him all that you could? A.—I did.

Q.—How far would he be from the car then when you got hold of him? A.—About eight feet.

Q.—They were apparently forcing their horse on? A.—Yes, he appeared to make a spring just as I got to him.

Q.—Then the accident happened in the way in which it has been described? A.—Yes.

CROSS-EXAMINED BY MR. ELLIOT.

20 Q.—Were you on Maitland street when you first saw the horse? A.—Just passing the watchman's shanty.

Q.—You had just got west of the shanty? A.—No, we were going west when the accident happened.

Q.—Then you had got past the shanty when you observed the horse? A.—Yes.

Q.—You were west of the shanty? A.—Yes.

Q.—Right at Maitland street? A.—Ten or fifteen feet off Maitland.

Q.—Is not the shanty right on the line? A.—No, it lacks about 10 or 15 feet from the main part of the road.

Q.—I do not mean the travelling part of the road, but the road allowance, is not it just on it? A.

30 —Just about it.

Q.—You had shot past the signal house before you saw the horse? A.—Yes, I was past that before I saw it.

Q.—They were close upon the track? A.—They were about 15 feet from the track.

Q.—Was the horse agitated at all? A.—I could not say that he was.

Q.—He was going pretty fast? A.—Four or five miles an hour.

Q.—Did the horse see the train? A.—I do not know.

Q.—Did you jump off? A.—Yes.

Q.—Did you run diagonally across to where the horse was? A.—Yes.

Q.—And seized him by the head? A.—Yes.

40 Q.—Did you get a pretty good hold? A.—I don't know whether I did or not, I hung on till I got close to the cars, then I let go.

Q.—Did you stop the horse at all? A.—No, I do not think I did. He carried me till the car touched me, then I let go.

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Q.—This carriage was wrecked as it is described here ? A.—Yes.

Q.—There is no doubt about that ? A.—No.

Q.—These two men were thrown out ? A.—Yes.

Q.—Were they stunned ? A.—I don't know whether they were or not.

Q.—You saw them afterwards ? A.—I helped to pick them up.

Q.—Were they bleeding ? A.—The shortest one was.

Q.—That is Stewart ? A.—Yes.

Q.—Mr. Moore was not bleeding ? A.—No, Mr. Moore got up himself.

Q.—You thought Stewart was the more hurt of the two ? A.—I asked Mr. Stewart if he was hurt
10 and he did not make a reply.

Q.—You went up the track 45 yards to the switch ? A.—Yes.

Q.—With the intention of coming right back ? A.—Yes, sir.

FRANK G. TURTEN, called by the defendant, and sworn.

To MR. MEREDITH :—

Q.—You are a yardsman in the Grand Trunk ? A.—Yes.

Q.—Where were you that night ? A.—About Burwell street crossing.

Q.—That is the crossing west of Maitland ? A.—Yes.

Q.—What were you doing there ? A.—Getting my orders from the yardmaster.

Q.—Did you hear anything ? A.—I heard my mate hallooing.

20 Q.—Who is your mate ? A.—Worth.

Q.—Where were you when you heard him hallooing ? A.—Burwell street.

Q.—That is the distance of a block ? A.—Yes.

Q.—What did you do then ? A.—Both the yardmaster and I came up to see what the trouble
was.

Q.—The accident had happened then ? A.—Yes.

Q.—You heard the yelling at that distance ? A.—Yes, quite plain.

CROSS-EXAMINED BY MR. ELLIOT :—

Q.—Where were you when this accident occurred ? A.—Burwell street crossing.

Q.—On the crossing ? A.—Right near the crossing on the track.

30 Q.—Are you a yardsman ? A.—I got charge of that engine ; I am responsible for what work is
done by it.

Q.—You are not travelling on the engine ? A.—No.

Q.—You were at Burwell street crossing ? A.—Yes, sir.

Q.—That is eastward again ? A.—A block west of Maitland.

Q.—Do you know anything about this casualty report that has been furnished us ? A.—I could
not say.

Q.—You were asked about the accident the next day by the Company ? A.—I suppose I was.

Q.—It is said you were on the engine ? A.—That is not true.

RE-EXAMINED BY MR. MEREDITH.

40 Q.—You did not make any such statement as that ? A.—No.

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WM. HEAMAN, called by defendant, and sworn.

To MR. E. MEREDITH:—

Q.—You are a coal and wood dealer? A.—Yes, sir.

Q.—Where is your office? A.—On Maitland street, by the track.

Q.—How far from this track we have been talking of? A.—Fifty feet.

Q.—Were you in your office that night? A.—I was.

Q.—Did you hear the yelling that has been described here? A.—I did.

Q.—What distance could that be heard? A.—I heard it very plain. I suppose you could hear it a block or a block and a-half.

10 Q.—Did you see Moore after the accident? A.—Of course, hearing this noise opened the door and walked to the track.

Q.—You are in no way connected with the railway? A.—Not at all.

Q.—How was Moore? A.—Moore was standing up when I got to the track.

Q.—Was he sober? A.—I do not know what constitutes a man when he is drunk. Of course he could walk all right.

Q.—What indications did you find on him of liquor? A.—I could not say he was drunk, of course I smelt liquor on him.

Q.—Pretty strong? A.—Yes, pretty strong.

CROSS-EXAMINED BY MR. ELLIOT:—

20 Q.—Where were you at this time? A.—In my office.

Q.—How far was that from the crossing? A.—Fifty feet.

Q.—Did you hear the crash? A.—I did.

Q.—How long was that after the shouting? A.—I heard a continuous shouting, and about a minute or two after that the crash came. Of course I was on the road when I heard the crash.

Q.—You don't mean to tell us there was a minute or two elapsed between the hallooing and the crash, because this yardsman told us he ran fifteen feet? A.—I should judge it would be two minutes, two or three minutes the continued yelling and then I heard the crash, and of course there was yelling afterwards.

Q.—Then you went out? A.—Yes.

30 Q.—You saw these two men on the track? A.—Mr. Stewart was on the track; he had not been taken up, and Mr. Moore was standing up.

Q.—I suppose you thought Mr. Stewart was drunk because he laid there? A.—No; I expected we had found a dead man.

Q.—Moore was up and you thought he was drunk? A.—Mr. Moore could walk.

Q.—Because you smelt some liquor on him I suppose you thought he was drunk? A.—Mr. Meredith asked me if I smelt liquor on him.

Q.—That is the reason you assumed he was under the influence of liquor? A.—I supposed Mr. Moore had been drinking.

Q.—You judge that because you smelt liquor? A.—Yes.

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ANDREW JARVIS, sworn.

To MR. MEREDITH :—

Q.—You are a carriage-maker ? A.—Yes, sir.

Q.—You saw this buggy ? A.—Yes, sir.

Q.—What is your estimate of the value of the buggy ? A.—The way it is at present ?

Q.—What would it be worth before the accident ? A.—I could not say what it was before, because I did not see it.

Q.—What would it cost to repair it ? A.—Thirty dollars.

Q.—Put it in as good shape as it was before ? A.—Yes, better shape.

10 R. M. MEREDITH—I desire to renew the application for a non-suit.

THE COURT—Of course you will have the benefit of your motion whether there is a verdict against you or not, so you may as well go to the jury.

MR. MEREDITH—Does your honor rule as to the question of the buggy ?

THE COURT—I should be disposed to rule against you, Mr. Elliot, unless you have some authority.

MR. ELLIOT—I contend possession of goods constitutes sufficient ownership for a person to bring an action for any tort or any injury.

THE COURT—Perhaps it would be just as well to allow the whole case to go to the jury and then speak to this motion afterwards.

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JUDGE'S CHARGE.

GENTLEMEN OF THE JURY,—

This is one of these cases in which questions of some little difficulty occur. All these railway cases are more or less associated with some difficult question. Of course these railways are incorporations that are legitimate. They are incorporations that are permitted by the laws of the country, and the community generally sustain the action of their Legislature in permitting these railways to be made like a network all over the country. That being the case men are supposed when they come across these railways that it is necessary to cross them at times probably when there may be some danger ahead. It is necessary that they should exercise ordinary care, caution and diligence for the purpose of saving themselves from accidents, because these railway accidents are generally very severe, accidents most frequently attended with loss of life. Now, the railway may perhaps be negligent in this particular instance to some extent, but if the plaintiff has been negligent also, in a case of that kind it is called contributory negligence, because he contributed to the accident himself. In a case of that kind the law does not permit any damages to be given against the railway. A man has no right to run in the face of danger. It is every man's duty to take care of his own life; it is one of the instincts of his nature to take care of his own life. When he is in the presence of danger the first thing that suggests itself to every careful man is that he must be careful or he will get into trouble. That is the foremost idea in every person's mind, and the consequence is that it enables men of ordinary caution and prudence to look out and take care of themselves in the presence of danger.

Now in this case it is alleged, in the first place, that there was negligence on the part of the railway, which the Railway Company deny. But they say if there was negligence on the part of the railway there was also negligence on the part of the plaintiff because the night was dark. He crossed there hearing the whistling or hearing the bell ringing. He must have known, they say, that he required to exercise great caution. He should not have rushed across a railway in the dark after hearing the bell of the engine, somewhere in the distance perhaps, cannot tell the distance, but at all events there was bell ringing, there is no doubt about that, and the question then is, one man might have got out and approached the track, and if there was any danger, he could have seen sufficiently far to judge if the other man could have driven across free from any accident such as occurred here. Instead of doing that they both remained in the buggy. They drove across at a trot, the same as they had been driving over the road, and by doing that on a dark night in the face of very suspicious movements on the part of engines, they were not taking that course that cautious men might take, and the accident resulted from their own negligence. In other words, he was guilty of contributory negligence and therefore the defendant would not be liable in the case. If you find that is the case, if the evidence in your opinion supports that theory, the verdict should be for the defendant, because another well known principle governing cases of this kind would virtually exclude them from the right to recover damages.

Now, gentlemen, I have put a number of points that I would direct your attention to, in the shape of questions which will assist you very materially in arriving at a correct conclusion, and also

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assist you afterwards in whatever judgment may be given. The first question that I shall put to you is :—

1st. At the time of the accident, and for some time before, was the bell of the engine ringing, and was there a man with a lantern standing at the end of the car? Upon that point you heard what the evidence was, and it is not necessary that I should dwell in detail on the evidence because it is sufficiently fresh in your memory, and the eloquent addresses that have been made on both sides, I think, leave very little for me to say to you in regard to the evidence bearing on this question. I shall be very brief in what I do say upon that point. They say that, in addition to the bell ringing, there was a yardsman standing at the end of this car that caused the accident, and that he had a lantern in his hand. They say further that when the rig was some ten or fifteen feet off the railway track where this engine was backing near this man, he says he shouted or yelled as he jumped off the engine and got hold of the horse by the head, endeavoring to keep him back, and the parties in the buggy forced him onward. It is a question for you to decide whether that should be the conduct of a cautious man who had his wits about him, because we cannot always judge these things; we cannot always say whether a man has his wits about him or not. A man at all events is presumed to have his wits about him, otherwise he should not be at large. Every man is presumed to be possessed of ordinary intelligence and ordinary caution. Now, the question for you is, did he exercise in the face of that evidence, if you believe that evidence, did he exercise ordinary caution and prudence in pushing on and pressing this horse forward when this man was endeavoring to put the horse back. He was then about ten feet from the railroad, and the car was about that time some fifteen feet from that particular part of the railway. Now, the second question is, did the man referred to, who was standing on the car that struck the buggy, jump off before the horse got as far as the track where the train was backing up, and did he seize the horse by the head and endeavor to keep him from getting on the track. It is for you to find whether that is true.

3rd. The third question is, did that man shout before the plaintiff got on the track, and if plaintiff was paying attention could he have heard him shout in time to avoid the accident? To support the affirmative of that question they put a witness in the box who says he was a block off, on Burwell street, and he heard the man shout. If he could hear him shout one block off, it is a question for you to consider if this man, who is only ten or fifteen feet from him, what is the reason he did not hear him shout at that particular time, when this man says he heard him a block away at Burwell street?

4th. If the defendants were guilty of negligence in causing the accident state what that negligence was. If you believe there was negligence I would like to find out what the negligence was, and I ask you gentlemen to assist me in getting at that conclusion. You will please write in under that question, in your opinion, what negligence defendants were guilty of.

5th. At what rate of speed were the cars backing up at the time of the accident? That is a very important factor in dealing with the case, because if the train was backing up at the rate of eight or ten miles an hour we all know there would be greater difficulty in avoiding an accident than if the train was only backing up at two or three miles an hour. The weight of evidence appears to favor the view that the train was coming in at the rate of between three and four or five miles an hour. It is for you to say in answer to that question then.

6th. If your answer to the second question is in the affirmative what explanation can be given with respect to the plaintiff's conduct in forcing the horse forward in the face of the approaching danger.

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7th. Was the plaintiff injured by the accident, and what does the injury consist of? Well, there is a great deal in what the learned counsel said in regard to the evidence on that point. The absence of a certain class of expert evidence—professional evidence in regard to his injuries. In almost all these cases where damage is claimed for personal injury there is generally evidence of doctors who can generally tell by examining the man whether he is shamming or whether his complaint is genuine. They have methods of examining, a means of knowing that an ordinary man like you and myself cannot tell anything about, but they have the faculty of judging and they are generally produced for that purpose. It is very easy for a man, when an accident has taken place, to say that he has been injured, because no one can enter into his person and judge of his bodily suffering, or judge of his symptoms, except these people who are experts and who can, by means of questions put to him, judge whether he is shamming or not. To avoid any danger of men being allowed damages for injuries which they have really never sustained, and which it would be manifestly unjust to give, it is usual in these cases to put some persons into the box who can give some evidence at all events to confirm the statement of the man who says he has been injured. In this case the evidence may be perfectly correct. I am merely referring to this as one of these matters that may be fairly commented upon in the way I am commenting upon it and in the way the learned counsel commented upon it. You have only got his naked statement to enforce a claim for damages.

8th. Assuming, for the purpose of this question, that the accident was caused by the defendants' negligence through no cause of the plaintiff, what damages, if any, do you consider the plaintiff sustained by reason thereof?

9th. Was the plaintiff at the time of the accident capable of taking care of himself, and could he, by ordinary caution, have avoided the accident? That also brings in the other matters that I have previously referred to.

10th. State what damages was done to the buggy in your opinion? For the purpose of this trial I would ask you to consider that, and say what damage was sustained by reason of that. In regard to whether it is a proper claim or not that is removed for the present time from you and will have to be argued before myself.

11th. Would a cautious man of a dark night, under the circumstances in evidence, be exercising prudence and ordinary caution in driving a horse at a trot over a railway track?

30 These are the questions I have put, and it crystalizes the whole matter, and I have left a sufficient space under the questions for you to insert your answer whatever you think the evidence calls for. Of course you will be guided only by the evidence; that is what you have to be guided by. So far as sympathies are concerned I need hardly say it would be exceedingly improper to permit that for one moment to influence your judgment. You are to decide the facts, and not to draw in outside matters at all, or to sympathize with one party or the other. If there is sympathy on one side, there may be sympathy on the other. A great deal has been said, and we know perfectly well that juries do take strong opinions in regard to railway corporations, and give heavy damages for reasons and causes known only to themselves, perhaps sufficient to warrant them, and sometimes which outsiders cannot understand. These corporations represent hundreds and thousands of people who are dependant upon their earnings; many of them are orphans and many of them widows. It is not a corporation without a soul you are dealing with, but you are dealing directly with a mass of individuals who are as much entitled to your sympathy as any person that ever comes before you. There has been a great deal of suffering, resulting, perhaps, from the want of prudence, in making investment in these corporations, and it is very

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hard. I think it is far better to deal with corporations as between man and man. Now, gentlemen, the matter has been fully gone into by the learned counsel on both sides. I am sure you will give the matter full consideration, and I will ask you to take these questions with you and look at them and write your answer underneath, and come to some conclusion on the subject.

MR. ELLIOT—There is one question ought to be added to these and that is, if the jury believes this man Worth seized this horse by the head whether that contributed to the accident?

THE COURT—That may be a fair question for you to consider, and if so, you will put that down as an independent answer yourself.

Jury retire.

10 Jury return.

Answer to first clause of first question—Not sufficient evidence. Answer to second clause—Yes.

Answer to second question—Yes, but not in sufficient time to prevent the accident.

Answer to third question—Yes, but not in time under the circumstances to avoid the accident.

Answer to fourth question—That they did not have sufficient warning.

Answer to fifth question—From three to five miles an hour.

Sixth—In his anxiety to get out of danger he did what, in his judgment, was best.

Seventh—Yes, but evidence not decisive enough to say extent.

Eighth—\$25.

Ninth—To the first clause, Yes; to the second clause, No.

20 Tenth—\$40.

Eleventh—Yes.

MR. ELLIOT—I move for judgment.

THE COURT—I will hear the motion to-morrow.

Court adjourned at 6 p.m., till 10 a.m. to-morrow.

Thursday, June 12th. Court opened at 10 o'clock.

MR. ELLIOT—On the questions as answered by the jury, I move for judgement for the plaintiff to be entered for the amount of \$65, which they find he is entitled to. All the questions, Your Honor will observe, negative negligence on the part of the plaintiff, and they there find negligence on the part of the defendant Company, which I submit entitles us to a verdict.

30 MR. MEREDITH—We claim Your Honor that the judgment must be for defendant, upon the grounds already taken for a non-suit, and also upon the finding of the jury. We claim that there is no finding of any negligence on the part of the Railway Company. There is no finding of any breach of duty by the jury. I need hardly argue to Your Honor that unless the statute lays down some duty which the railway has disregarded, no judgment can be given against them. The jury cannot formulate any rules by which the railway must be run. They cannot say that the railway shall do a certain thing. What the statute provides is all that the railway is bound to do. My learned friend has conceded, and I need not argue that, that the jury have not in this case the power to say that there should be a watchman there. At all events they did not say so. All that they say is, and all that my learned friend can ask you to pass judgment in his favor on, is the answer to the fourth question, "If the

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defendants were guilty of negligence in causing the accident, state what that negligence was? That they did not have sufficient warning." I do not know whether that is intended to mean the Railway Company or the plaintiff.

THE COURT--I fancy that meant the plaintiff.

MR. MEREDITH--Assuming it meant the plaintiff, what warning does the law require to be given to the plaintiff, which he did not have. I can conceive, Your Honor, that the jury have gone as far as their skill would let them go contrary to the facts to endeavor to give this plaintiff \$25, no doubt out of sympathy. How they square that with their consciences we will not here discuss. We will discuss that in the future applications to set the judgment aside if Your Honor gives judgment against us. I submit to Your Honor there is nothing whatever upon these findings upon which, in law, the defendant can be adjudged by this Court guilty of negligence. As pointed out in that Jones case, it is not for the jury to give a verdict without pointing to some fact of negligence which is a breach of duty. Now that has not been done. The mere saying that the Railway Company did not give sufficient warning is nothing upon which a judgment can be passed. The only possible question there could have been, if it had been answered in favor of the plaintiff, to sustain the verdict, would have been as to the ringing of the bell. Now, I need hardly argue to Your Honor that the onus of proving the bell was not ringing was upon the plaintiff. It was not for the Railway Company to prove that the bell was rung; there must be an affirmative finding that the bell was not rung. Now, the jury have not gone that far. All they say is that there is not sufficient evidence upon that question; that is to say, plaintiff has not satisfied the onus which the law puts upon him to show that bell was not ringing. They are unable to say whether the bell was ringing or not, so I submit to Your Honor there is nothing upon that point and I submit further, as to the ringing of the bell, that is not in question in a case of this sort. The ringing of the bell is only required where the train is crossing a highway, not shunting in the yard. The bell shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place where the train crosses the highway. This train was never eighty rods from that crossing, so that section could not apply. I contend there is no finding that the bell did not ring. I contend, even if the jury had found that it would not be applicable to this case, and that there is no finding of any breach of duty or negligence on the part of the defendants. As to the damage, I submit to Your Honor the damage to the buggy cannot be taken into consideration in this case. Look at the facts of the case. This man McNames has made no claim upon the plaintiff; he has gone away from the country, and makes no claim to the damages at all. If this Court should give Mr. Moore, the plaintiff in this case, \$40, a man who is worth nothing, from whom it could never be recovered again, and Mr. McNames should come back and sue the Railway Company they would have no defence. What possible defence would it be to Mr. McNames' claim that Moore had brought an action and got judgment for it? I admit if a man is bailee of goods, and if they are taken out of his possession, he has a right to recover for them. I submit if there is any judgment in this case at all it must be for only \$25.

MR. ELLIOT--The jury have held that it was negligence in as much as they did not give sufficient warning to the plaintiff. Now, assuming for a moment that this bell was ringing. The state the contentions that when the bell is rung from an engine that the engine is coming first. Now the evidence here goes to show--Mr. Stewart states so; he is the only one that heard the bell--that he did hear a bell in the distance and if he heard that bell in the distance he had a right to assume that engine was coming and that the engine would be first. That it would make its appearance first. But instead of that the engine was six cars away and the first thing they knew these cars were upon them. If this

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engine were coming foremost, and they heard the bell ringing, there would have been ample time to escape, possibly go two or three times over, but instead of the engine there are these six cars. That, I submit, is negligence, and that is what the jury contemplated when they answered that question.

THE COURT—Could you suggest anything that could be done by the Company more than they did to avoid this accident?

MR. ELLIOT—This brakeman who was at the end of that train for the very purpose of warning passengers, instead of driving on that car, should have remained on the crossing. He only had to go 40 or 50 feet, I think they said, and they were immediately returning, and instead of that he takes a position on that car where he himself says he could not notify any person approaching the crossing unless he was right upon the street. Now, we say, that was negligence. We say that although this Company may not by law be required to have a watchman, yet they are required to notify people of the approach of a train, and the ringing of a bell at the other end of a train is not sufficient notice. Everybody knows that in that neighborhood you can hear half a dozen bells ringing. You do not know whether the train is coming towards you or going from you. Mr. Stewart said he thought he heard a bell some distance off. They were perfectly right in endeavoring to pass. They had no right to assume there were five or six freight cars backing in upon them.

THE COURT—They had a right to assume that as much as anything to the contrary. This is a shunting ground. What I want to find out was whether there was a watchman kept in that place night and day. If there was, and that watchman happened to be away from his post, I should certainly say that would be evidence of negligence on the part of the Company, but the witness said at 7.30 this watchman left the shanty. Consequently it was a common shunting ground and every person passing that ground had a perfect right to expect that they were subject to danger.

MR. ELLIOT—It is one of the highways of the city.

THE COURT—It was a right of way for trains as much as for foot passengers.

MR. ELLIOT—They have just as much right to notify the public as the public have to look out for them.

THE COURT—Unless there are statutory provisions pointing out such methods it is not for the jury to say some such method shall be taken. If they comply with the statutory provisions that is all that is expected of them. Can you tell me where they have not complied with the statutory provisions?

MR. ELLIOT—The statutory provision is that where they are crossing a highway the bell is to be rung.

THE COURT—That does not apply to this case. If it did apply to this case I should say, as a matter of fact, the bell was ringing.

MR. ELLIOT—Your Honor says because they have violated no statutory provision therefore they are not guilty of negligence. I submit that inasmuch as the jury have found that there is negligence, by their opinion that the plaintiff could not have avoided the accident by caution on his part.

THE COURT—I put that question to the jury for the purpose of getting what they consider a special negligence in this case. Instead of that they gave me a vague and indefinite reply that is no assistance whatever and means nothing. "Did not get sufficient warning." There is no meaning to be attached to that sufficient to find a verdict upon. I want the facts—I did not want the results—and they gave me none.

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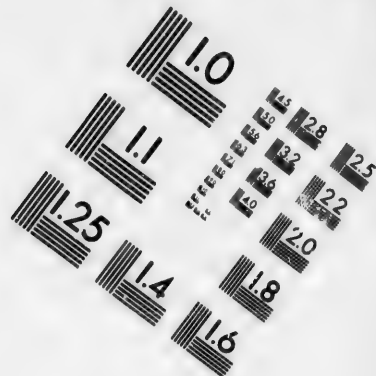
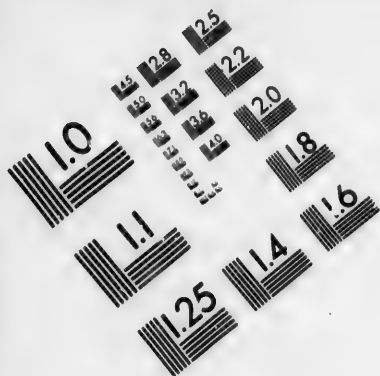
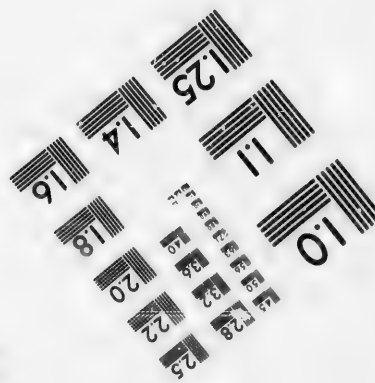
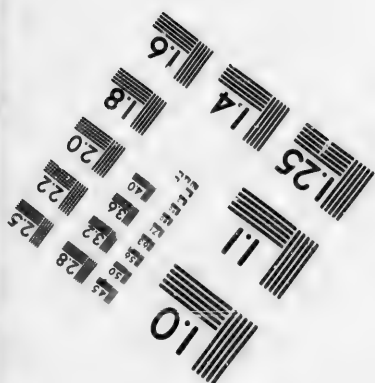
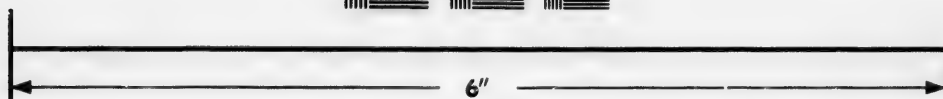
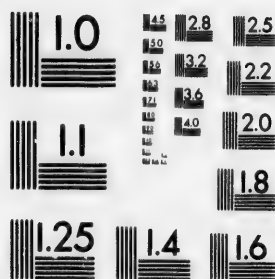


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MR. ELLIOT—They say the Company were guilty of negligence ; they say there was not sufficient warning. I submit every question that has been answered there by that jury has been answered in favor of the plaintiff, and I move for a verdict. Does Your Honor hold that the bailee is not entitled to recover against a wrongdoer ?

THE COURT—It is not necessary to hold that at present. I can tell you when the time comes. I do not think it necessary to prolong the argument. I do not think it possible any verdict found upon these facts could stand five minutes argument. I think I would be fully justified in non-suiting at the close of the case, but I wanted this case to go to the jury for the purpose more definitely of getting their opinions upon the facts. I think upon all the findings there is nothing in the shape of any
 10 evidence whatever to support the presumption of negligence, and I feel if there is an application made afterwards to set aside the verdict, if I should enter a verdict, I should feel constrained to set aside the verdict. I may feel that if I refused to do so that the Court of Appeal would very soon make me. Therefore it becomes unnecessary to decide that question of bailment. I find that there is no negligence. If I am not correct my decision of this matter can easily be corrected by a court having competent jurisdiction to do so.

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QUESTIONS TO JURY AND ANSWERS.

1. Q.—At the time of the accident and for some time before was the bell of the engine ringing, and was there a man with a lantern standing at the end of the car? Answer to first clause—Not sufficient evidence. Answer to second clause—Yes.
2. Q.—Did the man referred to, who was standing on the car that struck the buggy, jump off before the horse got as far as the track where the train was backing up, and did he seize the horse by the head and endeavor to keep him from getting on the track? A.—Yes, but not in sufficient time to prevent the accident.
3. Q.—Did that man shout before the plaintiff got on the track, and if plaintiff was paying
10 attention could he have heard him shout in time to avoid the accident? A.—Yes, but not in time under the circumstances to avoid the accident.
4. Q.—If the defendants were guilty of negligence in causing the accident state what that negligence was? A.—That they did not have sufficient warning.
5. Q.—At what rate of speed were the cars backing up at the time of the accident? A.—From three to five miles an hour.
6. Q.—If your answer to the second question is in the affirmative what explanation can be given with respect to the plaintiff's conduct in forcing the horse forward in the face of approaching danger? A.—In his anxiety to get out of danger he did what in his judgment was best.
7. Q.—Was the plaintiff injured by the accident and what does the injury consist of? A.—Yes,
20 but evidence not decisive to say extent.
8. Q.—Assuming, for the purpose of this question, that the accident was caused by the defendants' negligence through no cause of the plaintiff, what damages, if any, do you consider the plaintiff sustained by reason thereof? A.—\$25.
9. Q.—Was the plaintiff at the time of the accident capable of taking care of himself and could he by ordinary caution have avoided the accident? A.—To the first clause, Yes; second clause, No.
10. Q.—State what damage was done to the buggy? A.—\$40.
11. Q.—Would a cautious man of a dark night, under the circumstances in evidence, be exercising prudence and ordinary caution in driving a horse at a trot over a railway track? A.—Yes.

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JUDGMENT.

Upon the findings of the jury on the questions submitted I enter a verdict for defendants with costs.

June 17th, 1890.

(Signed),

F. DAVIS, J.

REASONS OF APPEAL.

1. That the learned Judge submitted certain questions to the jury, and they having found thereon as they did, he should have directed judgment to be entered for the plaintiff in conformity with the said findings.
- 10 2. That it was not competent for the learned Judge to disregard the findings of the jury as he has done.
3. That the judgment directed by the learned Judge to be entered on the special findings of the jury is wrong in law.
4. That the question as to what the negligence of the defendants consisted of could not be answered by attributing it to a single act, or to the omission of a single act, on the part of the defendants, as the learned Judge by the said question and by his remarks required.
5. That the jury answered the fourth question properly when they answered that the negligence consisted in not having sufficient warning, inasmuch as the defendants' negligence was compounded of several ingredients, such as the absence of the customary watchman at the place where danger was
20 imminent, the interception of the view by the interposition of cars, the improper seizure and checking of the horse by the railway employé and other circumstances.
6. That the said judgment is contrary to the weight of evidence, as well as wrong in law, and for non-direction in not telling the jury to consider the locality and all the circumstances requisite to show that proper precautions were taken by defendants.
7. That the learned Judge was wrong in holding that the compliance of the defendants with certain statutory requirements, such as ringing a bell or sounding a whistle, was sufficient to absolve them from liability.
8. That the learned Judge was wrong in holding the defendants were not required to ring a bell or sound a whistle unless the locomotive or train started beyond 80 rods distant from the highway.
- 30 9. That the judgment should be set aside and judgment entered for the plaintiff for the amount of damages found by the jury, with costs, or at all events a new trial granted.

HUME B. ELLIOT,
Appellant's Counsel.

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AVIS, J.

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